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2                    *IN THE UNITED STATES DISTRICT COURT*  
3                    *FOR THE WESTERN DISTRICT OF MICHIGAN*  
4                    *SOUTHERN DIVISION*

5                    DONALD AGEE, JR., et al,

6                                    Plaintiffs,

7                    vs.

Case No. 1:22-cv-272

8                    JOCELYN BENSON, et al,

9                                    Defendants.

\_\_\_\_\_ /

10                                    *MOTION HEARING*

11                    *HELD BEFORE THE HONORABLE JANET T. NEFF, PAUL L MALONEY, and*  
12                                    *RAYMOND L. KETHLEDGE*

13                                    *Lansing, Michigan, Thursday, July 13, 2023*

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110 Michigan Avenue NW.  
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1 Kalamazoo, MI

2 July 13, 2023

3 1:41 p.m.

4 *PROCEEDINGS*

5 THE CLERK: All rise, please. The United States  
6 District Court for the Western District of Michigan is now in  
7 session. The Honorable Paul Maloney, the Honorable Raymond  
8 Kethledge, and the Honorable Janet Neff presiding.

9 All persons having business with this Court, draw  
10 near, give attention, and you shall be heard. God save these  
11 United States and this Honorable Court.

12 You may be seated.

13 JUDGE MALONEY: This is file number 22-cv-272, Agee,  
14 et al versus Jocelyn Benson, Michigan Independent Citizen  
15 Redistricting Commission, et al. This matter is before the  
16 Court for cross motion oral argument on the motions for  
17 summary disposition filed by the plaintiff and the defendants.

18 The panel -- all panel members are present. The  
19 record should reflect that Attorneys John Bursch and Michael  
20 Pattwell represent the plaintiffs. Attorney Richard Raile,  
21 Erika Prouty, Nathan Fink and Heather -- Nathan Fink  
22 represents the Commission, Heather Meingast represents  
23 Secretary Benson. The plaintiffs are also represented by  
24 Attorneys Banks and Fleming.

25 Counsel, the way the panel has decided to proceed

1 here, we're going to give you 45 minutes for each side, and  
2 we're going to proceed in this fashion: Principal arguments  
3 on your motions for summary first. We'll start with the  
4 plaintiff, go to the defendant. Response to the defendants'  
5 motion is next. Then response to the plaintiffs' motion, and  
6 then rebuttal arguments in the same -- in the same fashion.  
7 You've got 45 minutes total for all the arguments.

8 Anybody need any clarification on that issue?

9 MR. BURSCH: Just wondering, who is going to be  
10 keeping the running clock and will they be letting us know at  
11 stage two and stage three how much time we have?

12 JUDGE MALONEY: You'll have to rely on Mr. Pattwell  
13 to warn you, Mr. Bursch.

14 MR. BURSCH: All right. Thank you.

15 JUDGE MALONEY: I've got a clock right here.

16 MR. BURSCH: Okay.

17 JUDGE MALONEY: All right. We are ready to proceed.  
18 Mr. Bursch, you may proceed on behalf of the plaintiffs.

19 MR. BURSCH: Good afternoon, Your Honor. John Bursch  
20 on behalf of the plaintiffs, a number of whom are in the  
21 courtroom today, may it please the Court.

22 The Redistricting Commission reduced the historical  
23 number of black majority-minority districts in the House, the  
24 Michigan House, from 10 to six and in the Senate from two to  
25 zero; reduced the number of black majority districts in an

1 area known for acute racially polarized voting, and what do  
2 you get? Fewer black elected representatives from 20 to 16  
3 following the 2022 election. That is a Voting Rights Act  
4 problem.

5 Now, the Commission was banking on so-called  
6 crossover districts in which districts with BVAPs in the  
7 40 percent range or even lower would result in the election of  
8 black candidates of choice, but when BVAPs are just generally  
9 capped at 40 percent across districts, which is itself an  
10 equal protection violation, then black candidates need  
11 substantial support from white voters, and in southeast  
12 Michigan, especially in the area of Oakland County, that  
13 rarely happens. In four of the most probative districts where  
14 black candidates squared off against white candidates in House  
15 districts five, six, and 13, and Senate District 8, white  
16 voters picked white candidates over black candidates by an  
17 average of more than 93 percent to less than 7 percent.

18 JUDGE KETHLEDGE: That was in 2022?

19 MR. BURSCH: Correct. And I'll be getting to those  
20 specifics because it's unusual in this case that we actually  
21 have an election under the maps. Usually we're trying to make  
22 predictions about that, but we have much better data here  
23 because rather than moving for preliminary junction, we  
24 decided to wait and brief this on the merits, and so we  
25 actually have election results under the maps.

1           Now, there's a lot of details and statistics in the  
2     briefing, and so my primary goal today is to simplify things  
3     for the Court, and for that reason I'm going to start with  
4     Gingles precondition one. This is an issue where the parties  
5     have a dispute that's purely one of law, and if we're correct  
6     on that, then the Commission essentially concedes that summary  
7     judgment is appropriate for the plaintiffs on at least Senate  
8     Districts 1 and 8, and that would necessitate that the Linden  
9     plan be redrawn and the evidence, frankly, is overwhelmingly  
10    one-sided in House districts eight, 11, and 26, and that means  
11    the Hickory plan would have to be redrawn and so --

12           JUDGE KETHLEDGE: Well, you have to get the other two  
13    factors preconditions as well.

14           MR. BURSCH: Yes, we do. So the evidence is either  
15    overwhelming or conceded on Gingles two and three and the  
16    totality of the circumstances, it's basically conceded as to  
17    those districts, so I focus on Gingles precondition one  
18    because there's a --

19           JUDGE KETHLEDGE: We'll see what --

20           MR. BURSCH: --legal dispute --

21           JUDGE KETHLEDGE: -- Mr. Raile says, but I get it.

22           MR. BURSCH: Yeah. Again, we'll have some disputes  
23    about the other districts under two and three, but I'll try to  
24    walk your way through that so you can get to a point where you  
25    don't have to do a district-by-district analysis for every

1 district at issue in this case.

2 So, starting with Gingles precondition number one, it  
3 simply asks whether a minority group could make up more than  
4 50 percent of the voting age population in a relevant  
5 geographic area. Why do we ask this? Well, if you had a  
6 minority population that was distributed all across the state  
7 it wouldn't be possible to put them into a district, and so we  
8 ask whether they are reasonably compact, and the question here  
9 is whether the map must also perform. The defendants say yes  
10 and they cite two cases, the Supreme Court's decision in  
11 Abbott versus Perez and the Fifth Circuit's decision in  
12 Harding, but neither case actually says that. In Perez, when  
13 the Supreme Court addressed Gingles one it only required the  
14 plaintiffs to show a possibility of creating more than the  
15 existing number of reasonably compact opportunity districts  
16 and quoted its own decision in LULAC on that point, L-U-L-A-C,  
17 and then in Harding the Fifth Circuit didn't disturb the  
18 District Court's conclusion that Gingles one was satisfied,  
19 and so the best explanation rejecting the defendants' theory  
20 on this is the Eastpointe decision from the Eastern District  
21 of Michigan. There the Court found that Gingles one was  
22 satisfied by demonstration maps prepared by the same expert  
23 that the defendants used in this case, Doctor Handley, and the  
24 Court emphasized that the efficacy of the illustration plan is  
25 not a factor to be considered in assessing Gingles one and, in

1 fact, it went through and rejected the exact Perez argument  
2 that they made here.

3 In addition, we have the Supreme Court's decision in  
4 Allen just last month and there again they found that Gingles  
5 one was satisfied based solely on demonstration maps without  
6 proof of performance. Proof of performance is something that  
7 comes later, does not come at the Gingles one stage.

8 Once that law is clear its application to this case  
9 is pretty straightforward. When you reduce the black  
10 majority-minority districts from 10 to six in the House and to  
11 two to zero in the Senate there is no question that better  
12 maps could have been drawn. In fact, every single map that  
13 Michigan has had since 1965 had more majority-minority  
14 districts in the Detroit area than their maps. Certainly  
15 having any maps with Senate districts with majority-minority  
16 districts greater than zero is possible. We're entitled to  
17 summary judgment on Gingles one, and I really don't think that  
18 is much of a dispute.

19 JUDGE KETHLEDGE: Now, Mr. Bursch, you know and the  
20 Supreme Court has told us over and over we have to do this  
21 district by district. We're not going to do this in sweeping  
22 state-wide terms.

23 MR. BURSCH: Correct.

24 JUDGE KETHLEDGE: There is one district I wanted to  
25 ask you about in particular, and let's say I'm accepting for



1 the moment your reading of Gingles one and Perez and so on,  
2 and that we're just looking at, you know, can the plaintiff  
3 from this district be a member of a reasonably drawn  
4 majority-minority district. HD2 seems to be kind of a  
5 challenge for you in that respect. This is one of these  
6 districts where the black voting age population is 11 percent,  
7 and if I understand correctly, it is not really contiguous to  
8 a larger -- to an area of other black voters that they could  
9 join to be in a majority-minority district, so I'm wondering  
10 as to that one how there is a genuine issue of material fact  
11 as to Gingles one?

12 MR. BURSCH: Well, first I want to push back a little  
13 bit on the district-by-district examination for --

14 JUDGE KETHLEDGE: Really?

15 MR. BURSCH: -- purposes of -- well --

16 JUDGE KETHLEDGE: The Supreme Court has reversed  
17 district courts four times in a row when they haven't done it  
18 district by district, so tell me why I don't need to worry  
19 about that.

20 MR. BURSCH: I understand. Because in the cases that  
21 you're talking about it wasn't possible to draw a  
22 demonstration map that included the requisite number of racial  
23 minorities in each one of the districts identified as a  
24 majority-minority district. Here, the demonstration maps that  
25 not only Mr. Trende but that the Michigan legislature in every

1 cycle since 1965 have drawn show that you can draw 10  
2 majority-minority House districts. Now, whether a particular  
3 plaintiff in House District 2 fits in one of those districts  
4 isn't as material for a Gingles one analysis as to whether 10  
5 districts can be drawn. Do you see the distinction I'm  
6 drawing there?

7 JUDGE KETHLEDGE: I mean, if we're looking at the  
8 claim of the plaintiff from HD2, the question as to -- I mean,  
9 you know, there's a distinct claim as to that person in that  
10 district, and my question is, you know, how have you -- what  
11 would you point to that shows that as to that plaintiff in  
12 that district for that claim a fact -- reasonable factfinder  
13 could say that plaintiff could join a reasonably drawn  
14 majority district?

15 MR. BURSCH: Why don't I come back to you on that in  
16 the responsive part of this? What I'll do is I'll sit down  
17 with the map and --

18 JUDGE KETHLEDGE: That's fine.

19 MR. BURSCH: Rather than waste all my --

20 JUDGE KETHLEDGE: I get it.

21 MR. BURSCH: -- time right now.

22 JUDGE KETHLEDGE: I get it. Well, it wouldn't be a  
23 waste of your time.

24 MR. BURSCH: We can append all the plaintiffs into  
25 the demonstration map districts, but I'll come back to that.

1 JUDGE NEFF: Could we just -- one question I have for  
2 you, Mr. Bursch. You said a little while ago that it's clear  
3 that better districts could be drawn or better maps could be  
4 drawn, right?

5 MR. BURSCH: Well, I didn't say better. What I said  
6 is we could draw maps with a significant number of majority  
7 and minority districts that don't exist in the --

8 JUDGE NEFF: That's fine. Thank you for the  
9 correction. But my question is is the perfect the enemy of  
10 the good here, truly? I mean, if the finding is that the  
11 districts as drawn meet the tests that are before us, does it  
12 make a difference if they could have been differently drawn to  
13 achieve results that the plaintiffs think are proper?

14 MR. BURSCH: If you would decide that the maps that  
15 they've drawn are adequate substitutes for the maps that we  
16 used to have, then maybe you could reach that conclusion, but  
17 as I get into the Gingles two and three preconditions I'll be  
18 able to show conclusively that that is not the case, that the  
19 white crossover voting that the Commission is depending on in  
20 order to get the requisite number of black influence or  
21 crossover districts simply doesn't happen, especially when  
22 you're talking about mixing Detroit, Wayne County areas with  
23 Oakland County. The Oakland County voters just overwhelm  
24 their black counterparts in Detroit and Wayne County, so I  
25 would not say that the perfect is the enemy of the good. I

1 would say that for purposes of Gingles one that there is no  
2 beauty contest here. I think ours would win a beauty contest  
3 if you had one, but so long as we can demonstrate that the  
4 black population in Detroit is sufficiently compact that you  
5 could draw 10 districts in the House, then that's sufficient  
6 to get past Gingles one. It is not an incredibly onerous  
7 requirement. That's why in the Allen case the Court looked at  
8 the demonstration maps and said, sure, you could have two  
9 districts not one.

10 Now let's get on to the meat of the Gingles analysis  
11 which is factors two and three. Any other questions about  
12 Gingles one?

13 JUDGE NEFF: No.

14 MR. BURSCH: Okay. With respect to Gingles two and  
15 three, then, which I'll address together, it's not really in  
16 dispute that black voters in metro Detroit generally vote  
17 cohesively. That's why the Commission felt compelled by the  
18 Voting Rights Act to create crossover districts in the first  
19 place, and so the primary question that you're looking at is  
20 this -- the validity of this white crossover voting, and we  
21 have two advantages here that we don't have in some cases.

22 The first I've already mentioned is that because we  
23 did not move for a preliminary injunction motion we actually  
24 have results under these maps from the 2022 primary, and  
25 that's going to be extremely helpful, and, second, because

1 this isn't the typical case where you're just asking, for  
2 example, in Alabama whether there should be one black  
3 majority-minority district or two, but here you're talking  
4 about a whole passel of state and senate districts. We have  
5 large pots of data to draw from.

6 And it's true, to kind of get back to your point,  
7 Judge Kethledge, that we don't use state-wide data, for  
8 example, to look at the districts in southeast Michigan, but  
9 with respect to each one of these districts, it's fair to look  
10 at the surrounding districts and see how they're performing.  
11 The Supreme Court has not ruled that out. If you look at the  
12 Cooper v Harris case, footnote five, what they reject is using  
13 other parts of the state, for example, to say what's going on  
14 in Detroit. We're not going to do that.

15 JUDGE MALONEY: Which are more probative, the  
16 primaries or the general?

17 MR. BURSCH: Certainly the primaries are more  
18 probative where everyone agrees that in the run of the mill  
19 cases that the black voters are going to vote for the  
20 Democratic candidates in the southeast Michigan region, so if  
21 we want to know how white and black voters are going to be  
22 reacting vis-à-vis each other, we have to look at the  
23 primaries.

24 JUDGE MALONEY: What about the final result of the  
25 general election vote?

1 MR. BURSCH: Far less probative, in our view. So,  
2 for example, if you had five influenced districts where the  
3 BVAP was around 40 percent and in each one of those the white  
4 candidate of choice prevailed because of the low BVAP number,  
5 that white candidate of choice very well may be the black  
6 candidate of choice in the general election, so if you look at  
7 the general election results you say, oh, the black population  
8 got their candidate in every single one of these districts,  
9 but if you go back to the primary you can see they actually  
10 went over five.

11 JUDGE MALONEY: And obviously we're talking about the  
12 Democratic primary.

13 MR. BURSCH: Of course, yes. Yeah. So what I want  
14 to do is focus first on the most probative districts and then  
15 back up, and to help us walk through that, because there is so  
16 much data, I took what I considered the 11 most probative  
17 districts out of the joint appendix, mostly from Doctor  
18 Handley's report, and pasted them on to an exhibit so we can  
19 just look through that as opposed to bopping around in the  
20 joint appendix. I've got a couple copies here for opposing  
21 counsel, and with your permission, I'll approach the bench and  
22 make sure you each have one copy as well. And, remember, the  
23 key that we're going to be testing here is evidence of white  
24 crossover voting in these key districts.

25 JUDGE KETHLEDGE: What are your criteria for

1 identifying these as the most probative?

2 MR. BURSCH: Where you've got primarily black and  
3 white candidates facing off against each other, preferably  
4 one-to-one, two-to-two, but in a couple instances the fields  
5 are a little bit bigger than that. Another is that you either  
6 have both incumbents or no incumbents. There is one instance  
7 we have one incumbent, and I'll talk about that, but generally  
8 that makes a difference if you have one incumbent against a  
9 field of non-incumbents, so those are -- those are the biggest  
10 criteria I'm using for most probative.

11 So, we're going to start with eight of our challenged  
12 districts, which I consider highly probative, starting with  
13 Senate District 1, and this is one, if you look at the chart  
14 that the Commission defendants put in their joint appendix  
15 papers, they don't even contest that -- that at least -- that  
16 they're not entitled to summary judgment on Gingles factors  
17 two and three. I think based on this it's pretty clear that  
18 we're entitled to summary judgment on Gingles two and three.  
19 So, here it's a 36.6 percent BVAP. That means that black  
20 voters, under their theory --

21 JUDGE KETHLEDGE: What are we talking about right  
22 now, what district?

23 MR. BURSCH: This is the very first district on here.  
24 It is State Senate District 1.

25 JUDGE KETHLEDGE: Thank you.

1 MR. BURSCH: So, again, they don't argue that they  
2 are entitled to summary judgment on Gingles two and three with  
3 respect to this, so here the black candidate of choice,  
4 Sanders, had 34 percent but only got 16.8 percent of the white  
5 votes. Just to be clear, the middle column -- I'm sorry, the  
6 left column is the primary vote without regard to race. The  
7 middle column are the black voters. The right column are the  
8 white voters. The primary columns in the left and the right  
9 there, the ones that have the highlights in them, showed the  
10 -- Doctor Handley's best guess as to how these percentages  
11 broke down for each one of the candidates --

12 JUDGE KETHLEDGE: None of these --

13 MR. BURSCH: -- on the bottom.

14 JUDGE KETHLEDGE: -- headings are over these columns  
15 here, right?

16 MR. BURSCH: They were all in the joint appendix. I  
17 was --

18 JUDGE KETHLEDGE: Oh, okay. All right.

19 MR. BURSCH: -- trying to --

20 JUDGE KETHLEDGE: All right.

21 MR. BURSCH: Yeah.

22 JUDGE KETHLEDGE: Go ahead.

23 MR. BURSCH: Yes. So it's general -- I mean, you  
24 know, the total vote, black vote, white vote.

25 You can see in Senate District 1 that Sanders was by



1 far running away the number one choice of black voters at  
2 34 percent but was only able to take 16.8 percent of the white  
3 voters, and that's why the black candidate of choice lost  
4 Senate District 1. The white candidate of choice took  
5 55.9 percent of Senate District 1 and this is why the  
6 Commission, at least on its chart, agrees it is not entitled  
7 to summary judgment on Gingles two and three, and this is one  
8 of its better crossover districts.

9 So now we move down to Senate District 8, and they  
10 don't really contest that they're not entitled to summary  
11 judgment on Gingles two and three either. McMorrow is a  
12 candidate from Oakland County, and you're going to see a  
13 reoccurring theme in these that whenever black voters in  
14 Detroit Wayne County are joined with Oakland County they are  
15 put at a distinct disadvantage because of the white bloc  
16 voting, so here the black candidate, Bullock, took  
17 75.8 percent of the vote. You know, in almost any election  
18 that would be overwhelming victory except that the -- the  
19 white voters picked their Oakland County candidate over the  
20 black candidate 95.9 to 4.1. That's about as definitive --  
21 definitive rejection of their white crossover voting theory as  
22 you can possibly have. And, again, the Commission agrees that  
23 at a minimum it is not entitled to summary judgment on Gingles  
24 two and three with respect to this district.

25 One final Senate district before we move to some

1 House districts is Senate District 11. This is only a  
2 19.2 percent BVAP, so it is not a crossover district but it  
3 does show compelling evidence of the -- the racial disparity.  
4 The Commission's expert Handley doesn't even analyze this, but  
5 you can see here that the black voters favored Owens over  
6 Klinefelt but the white voters picked Klinefelt by an 80 to 20  
7 margin, so, again, they picked the white candidate over the  
8 black candidate by an overwhelming amount, something that  
9 shows very little white crossover.

10 So, as you flip to page 2 now we start to pivot into  
11 the House districts where we've got plaintiffs that have  
12 brought a challenge. So, the very first one is State House  
13 District 7. There is a 43.3 percent BVAP. The Commission  
14 would say this is a safe district for black voters. It's  
15 highly probative because it's only got one black candidate and  
16 two white candidates, and here the white voters chose the  
17 white candidates over the black 62 to 37. Now, in the  
18 abstract that doesn't sound as bad, not like 90 to 10 or 95 to  
19 five as we just saw and we'll see again, but here Helena  
20 Scott, the black candidate, is the incumbent and she couldn't  
21 even carry 40 percent of her white constituents, so you can  
22 imagine what happens in a future race when she's term limited  
23 and we have nonincumbent black and white candidates running  
24 against each other. Again, this is Oakland County. That --  
25 the black candidates aren't going to stand a chance in a 44

1       percent BVAP district.

2               JUDGE KETHLEDGE: What district are we talking about  
3       again?

4               MR. BURSCH: It's on the top left-hand corner of each  
5       one of these. This is House District 7.

6               JUDGE KETHLEDGE: Oh, 7, all right.

7               MR. BURSCH: Seven. So right below that is House  
8       District 8. Another Oakland County bacon-mandered district.  
9       44.7 percent BVAP. Again, this should be an easy district for  
10      the black candidates to take, according to the Commission.  
11      Again, very probative. You've got two black candidates, three  
12      white candidates, no incumbents. You can see that the black  
13      voters picked the two black candidates by substantial margins,  
14      32 percent, 31 percent, yet the white preferred candidate  
15      still won handedly because white voters picked white  
16      candidates by an 87 to 13 percent margin. Again, overwhelming  
17      evidence that there is not white crossover voting.

18              We flip to the next page. This is State House  
19      District 11. Again, 42.8 percent BVAP. Commission would say  
20      this is a safe district for black voters. We have, instead, a  
21      Hispanic candidate who wins first place who was the sixth  
22      choice of black voters with only 6.6 percent. Well, how does  
23      that happen? Well, it's because the Hispanic candidate was  
24      the overwhelming choice of white voters, and even though you  
25      had four black candidates in this nine candidate race, they

1 received less than 30 percent support from white voters.

2 Again, overwhelming evidence against crossover.

3 And then State House District 13 right below that,  
4 this is a 38.4 percent BVAP. You should at least have a  
5 strong chance to select your candidate of choice as a black  
6 voter, and it is as probative as you can get. It's one black  
7 candidate, one white candidate, and the white voters picked  
8 Stone over Miller 91 and a half percent to eight and a half  
9 percent. And now the Commission would say, well, this is a  
10 win for black voters because, look, Stone, the white  
11 candidate, was also the black voter -- or black candidate of  
12 choice; 53 to 47. Well, that's because Stone was from a  
13 county where she could raise a lot more money than the black  
14 candidate could and there was a 40-to-one fundraising  
15 advantage so it's no wonder that she could squeak out a  
16 victory among black voters. What's clear is the white voters  
17 would not vote for the black candidate.

18 JUDGE KETHLEDGE: All right. Go ahead.

19 MR. BURSCH: Next page, this is the last of the  
20 challenge for what I think very probative districts, this is  
21 House District 26. Here, 35.8 percent BVAP. Again, the  
22 Commission's view would be black voters have a strong chance  
23 of prevailing here. Highly probative. We've got two white,  
24 two black candidates, no incumbents. The top black candidate  
25 receives 55 percent of the vote. The number two black

1 candidate gets 32 percent of the black vote. Neither one of  
2 them even come close to winning. I mean, not even within  
3 13 points, and why is that? Because the white candidate of  
4 choice, a white candidate, gets 76 percent of the vote, and in  
5 all, white voters choose white candidates over black  
6 candidates 82 to 18. In every single one of these it is just  
7 a tidal wave when it comes to this crossover voting theory.

8           So, we've got one additional challenged probative  
9 district. This one isn't, I think, as compelling until you  
10 really dig into it. This is Senate District 6. And here Mary  
11 Cavanagh is the winner, and if you look at the black votes,  
12 you would say, oh, well, that makes sense because she was the  
13 candidate of choice for black and for white voters, but then  
14 when you dig into this a little bit deeper it's really not  
15 quite that clear, and that's because Cavanagh was an incumbent  
16 from the House, and if you look below in the previous district  
17 that roughly mirrored this one, House District 10, and this is  
18 also from the defendants' expert reports, when Cavanagh ran  
19 for the House she wasn't even in the top two choices among  
20 black voters. Ruffin and Harris, both black voters took first  
21 and second with well over 50 percent of the vote. But  
22 Cavanagh beat Harris, the white candidate over the black  
23 candidate, 61.8 to 11.5. So, although this was the black  
24 candidate of choice in 2022 by virtue of the incumbency  
25 designation, all you have to go back -- to do is go back

1 two years and you can see that the lack of white crossover  
2 voting continues.

3 JUDGE KETHLEDGE: Well, I mean, just by way of  
4 example, Mr. Bursch, I mean, in that district I kind of -- I  
5 struggle to see how we would grant summary judgment in your  
6 favor as a matter of law and find that there is white  
7 crossover -- I'm sorry, white bloc voting in that district  
8 that denies African American voters an opportunity to elect  
9 the person they want in a primary. I mean, I understand the  
10 argument -- the point you just made --

11 MR. BURSCH: Right.

12 JUDGE KETHLEDGE: -- you know, but --

13 MR. BURSCH: So, I --

14 JUDGE KETHLEDGE: -- as a matter of law --

15 MR. BURSCH: -- just -- yeah. I was going to save  
16 this for the end of this portion of the presentation but let  
17 me just jump to it now. With respect to some of these  
18 districts, we're entitled to summary judgment now. The ones I  
19 identify specifically are Senate District 1 and 8, which the  
20 defendants do not meaningfully -- meaningfully contest, and House  
21 Districts 8, 11, and 26. You know, I think each one of those  
22 on their face is overwhelming.

23 As we get out to these other districts, one like  
24 this, I think it's entirely within the panel's discretion to  
25 consider what's happening in all these surrounding districts.

1 Now, I know ordinarily when you look at the case law in a VRA  
2 case you're just looking at one district or two districts, but  
3 that's because we're talking about one congressional district  
4 versus two congressional districts. Here, when we have a map  
5 that covers the entire Detroit metro area and it has  
6 disparities in white bloc voting like the ones that we're  
7 seeing, I think you can take the seven races -- or six races  
8 that we looked at right before this one and apply it to this  
9 one as well, particularly when you look at the 2020 primary  
10 and you see those figures there.

11 Now, you know, how you go about this is entirely up  
12 to you. If you decide that we win two to three districts on  
13 summary and they're redrawing the maps, you know, then -- then  
14 maybe we decide that a trial isn't necessary. They stipulate  
15 to liability because they have to redraw the maps anyway and  
16 then we all go back to the drawing board, so maybe that's one  
17 way to resolve it. Another way is you look at the collection  
18 of evidence in southeast Michigan and you say that even if in  
19 a particular district there could be a question of fact, we  
20 can resolve it because on the whole when we look at the big  
21 picture the material facts tell us that the existence of white  
22 crossover voting in the key areas isn't there.

23 JUDGE KETHLEDGE: As to the districts to which -- in  
24 which -- or as to which you think you ought to get summary  
25 judgment, the ones you just stated, I mean, you're pointing to

1       this 2022 data, which would seem to be --

2               MR. BURSCH: The best data.

3               JUDGE KETHLEDGE: -- very relevant but it's not  
4 necessarily dispositive, right? I mean, we're supposed to  
5 look at the totality of the circumstances, and I think that  
6 the Supreme Court would want us to probably see if there's  
7 some more historical data that confirms or denies, and so why  
8 do you think -- I mean, in your view is this enough for  
9 summary judgment, just what you've been talking about now --

10              MR. BURSCH: I think --

11              JUDGE KETHLEDGE: -- or are there more --

12              MR. BURSCH: -- it is, but we have --

13              JUDGE KETHLEDGE: -- things you would point to?

14              MR. BURSCH: Yeah. I would point to two other  
15 things. Obviously we don't have these exact districts  
16 represented in past elections, but we can look in the area and  
17 look at districts that were similarly situated geographically.  
18 We point to about, I don't know, seven or so -- or eight races  
19 or so from the gubernatorial stage all the way down in our  
20 reply brief from past elections that all showed the same type  
21 of disparity between white candidates and black candidates  
22 when white voters are voting, so that's number one.

23              But, number two, you don't even really need to look  
24 at this data or that data. Just take the word of their  
25 experts. Their expert said that they had to draft VRA



1 compliant districts because they acknowledged that there was  
2 cohesive black voting and cohesive white voting in the area.  
3 They tried to solve that problem by cracking black voters into  
4 these influence or crossover districts as opposed to drawing  
5 majority-minority voting districts, and the Supreme Court has  
6 suggested as a matter of law that doing that was wrong. That  
7 if you've got enough voters to have a majority-minority  
8 district and everybody acknowledges that the VRA is implicated  
9 because of the cohesiveness of both black and white voters  
10 then crossover districts is not the way to solve the problem,  
11 and these 2022 elections prove why that's the case, because in  
12 a highly racially polarized area like metro Detroit white  
13 voters are not going to consistently support black candidates,  
14 so I think we win on the 2022 data. I think we win again when  
15 you throw in the old data. I think we win based on their  
16 expert report, and, frankly, just on their acknowledgment that  
17 there are VRA problems here, that's why they're considering  
18 race in the first instance.

19 Briefly I'll just tick through the rest of these. I  
20 had two additional non-challenged districts, highly probative  
21 districts. Again, these aren't challenged districts, but  
22 they're right in the same area. House District 5, this is  
23 another one that goes into Oakland County. The black  
24 candidate of choice, the black candidate himself, Mr. Davis,  
25 55 percent of the black vote but yet he lost going away

1 because the white voters overwhelmingly supported white  
2 candidates, and the exact same thing in House District 6, and  
3 so, Judge Kethledge, to your point, you know, do we do this  
4 district by district or do we look at this in the whole area,  
5 because what do we do with the 2022 district that only had one  
6 candidate running? What do we do with the district that it  
7 was a black candidate versus another black candidate? Well,  
8 on the very last page here, based on these most probative  
9 districts, this is the evidence of white crossover voting in  
10 Detroit in the best races that we have to determine that, and  
11 you can look down the board here: 92 to seven, 93 to six, 87  
12 to 12, 91 to 8, 87 to 13 essentially, 95 to four, and 80 to  
13 20, yet these are not close cases. We're not talking about  
14 55/45 splits or even 70/30 splits. They're evidence of white  
15 crossover voting, which is what their whole case depends on,  
16 doesn't exist in the 2022 election data.

17 So, I do want to pivot back briefly to this point  
18 about creating white crossover districts, which was their  
19 strategy. You know, first we have the citation from their  
20 lawyers' briefing, the Baker Hostetler's firm briefing in the  
21 North Carolina redistricting that we cited in our reply brief  
22 where they said in that case if you have black majority  
23 districts that are sufficiently large to create those types of  
24 districts that crossover voting districts are inappropriate,  
25 but you've also got the Baldus decision that we cite in our

1 opening brief on page 31, and the point is a common sense one  
2 that a bird in the hand is worth more than two in the bush.  
3 That when it comes to Voting Rights Act compliance it's better  
4 to have a black majority-minority district at 55 percent than  
5 to have two districts that are at 40 percent and below with  
6 the hope that black candidates might be able to overcome white  
7 reluctance to vote for them.

8 JUDGE MALONEY: Didn't one judge say pistachio ice  
9 cream?

10 MR. BURSCH: Pistachio ice cream?

11 JUDGE MALONEY: Right.

12 MR. BURSCH: Yes, yes. In that very case, yes.  
13 That's very good. You know, so, you know, I don't think you  
14 need to go district by district with this kind of evidence,  
15 but at a minimum there's going to be five districts that you  
16 can just scrape right off the top.

17 That -- that still doesn't get us all the way home  
18 because we've got the totality of the circumstances, and they  
19 don't really raise a meaningful argument here. They did not  
20 make a totality of the circumstances argument in their opening  
21 summary judgment brief. They devoted all of one page to it in  
22 their response brief, and they did not address it in their  
23 reply brief. Simply, you know, on that basis alone you can  
24 tell how serious it is, and the reason for that is because  
25 their expert, Bruce Adelson, and our expert, Brad Lockerbie on

1 this issue are in total lockstep agreement. There's no  
2 difference of opinion about that at all.

3 In addition, we've got the lay testimony, the  
4 affidavits from Lemmons and Smith, and they don't have  
5 anything like that. Not only do they fail to brief it, they  
6 don't offer any evidence at all; no lay testimony, no expert  
7 testimony. They do raise a couple of questions, kind of  
8 hypothetical lawyers' questions in their response brief in  
9 that one page. I'm happy to address those if you would like  
10 me to, but I would prefer not to waste the valuable time I  
11 have unless you have specific questions. Okay. Then I'll  
12 move on.

13 So, you know, if we're right on the law on Gingles  
14 one, we get summary judgment there. They don't meaningfully  
15 contest totality of the circumstances so we're entitled to  
16 summary judgment on that point. That leaves Gingles two and  
17 three. I've identified five districts for you that we're  
18 entitled to summary judgment right now, and I think you could  
19 use the totality of the evidence to hold that we're entitled  
20 to summary judgment as to Gingles two and three with respect  
21 to all the districts.

22 Then we get to equal protection, you know, and if  
23 there's anything that we know about equal protection claims,  
24 and this was emphasized in the Harvard and University of North  
25 Carolina racial admissions cases that the Supreme Court just

1       decided at the end of the term, that you can't use quotas and  
2       yet what the Commission did is they used 40 percent quotas.  
3       They started to draw districts that had much higher BVAP  
4       percentages, percentages that would have mirrored the maps in  
5       the past that assured that black voters in Detroit had their  
6       adequate representation, and the commissioners themselves --  
7       this is in the defendants' admission, this isn't our point,  
8       this is theirs -- that the attorney came in and started  
9       pushing them, cramming the commissioners down to reduce all of  
10      those districts to 40 percent wherever possible. It's not  
11      just their -- their own people who acknowledge it. It's also  
12      in the MSU report at page 153. That's in the joint appendix  
13      at page 844, and what we know from Shaw v Hunt and cases like  
14      Cooper v Harris is that you can't set quotas, and, you know,  
15      their point is, well, we were doing this all in the pursuit of  
16      partisan balancing when it comes to the politics because the  
17      Michigan constitution says we have to do that, but obviously  
18      that principle in the Michigan constitution does not supersede  
19      what the Voting Rights Act and the Equal Protection Clause  
20      provide, and as your starting point --

21               JUDGE KETHLEDGE: Let me ask a question. I'm --

22               MR. BURSCH: Absolutely.

23               JUDGE KETHLEDGE: -- trying not to talk over you.

24               MR. BURSCH: Ask as many questions as you want. I  
25      encourage those. I want to know where your concerns are.

1 JUDGE KETHLEDGE: I just want to try to understand  
2 the law a little more clearly as to the question -- the legal  
3 question that we're answering here, and so the Commission can  
4 consider race, it can be aware of race --

5 MR. BURSCH: Yes.

6 JUDGE KETHLEDGE: -- right?

7 MR. BURSCH: If they conclude that there is a VRA  
8 problem, which they did.

9 JUDGE KETHLEDGE: Well, I mean, they just generally  
10 can be aware -- it's not just in a strict scrutiny phase,  
11 correct? The first step is did race predominate, right --

12 MR. BURSCH: Yes.

13 JUDGE KETHLEDGE: -- as a factor in drawing these  
14 lines?

15 MR. BURSCH: Yes.

16 JUDGE KETHLEDGE: And my sense of that -- and I just  
17 want to explore whether I'm right. My sense of that is that  
18 for race to predominate the Commission or -- you know, let's  
19 say a legislator must use race not as a proxy for some other  
20 object that they have in drawing the lines but they must be  
21 considering race as race.

22 MR. BURSCH: Yes.

23 JUDGE KETHLEDGE: For example, we -- our object is to  
24 thwart the election of candidates preferred by black voters in  
25 the primary, that we want to reduce the success of those

1 candidates. That would --

2 MR. BURSCH: Can I pause there?

3 JUDGE KETHLEDGE: Yeah. Go ahead.

4 MR. BURSCH: Clearly that would be sufficient --

5 JUDGE KETHLEDGE: Sure, right.

6 MR. BURSCH: -- but the Supreme Court said it doesn't  
7 have to be subjective racial intent. That if it has a  
8 disparate impact, that's enough.

9 JUDGE KETHLEDGE: Which case was that?

10 MR. BURSCH: I'll grab that in response.

11 JUDGE KETHLEDGE: That's okay. You can do --

12 MR. BURSCH: It's in our --

13 JUDGE KETHLEDGE: -- that when you come --

14 MR. BURSCH: -- brief.

15 JUDGE KETHLEDGE: -- back.

16 MR. BURSCH: Yeah.

17 JUDGE KETHLEDGE: So my -- I mean, it seems to me  
18 that one could certainly argue in this case that even taking  
19 into account the chairperson's affidavit about the lawyer  
20 getting involved and wanting to push the numbers below a  
21 certain threshold that they were doing so for partisan -- for  
22 partisan reasons. They were -- they were treating race as a  
23 proxy for party affiliation in doing so. Their object was to  
24 have a certain partisan balance which they did by distributing  
25 different kinds of voters that they thought would vote certain

1       ways, and that it wasn't an effort to deny the preferences of  
2       black voters as black voters. That's --

3               MR. BURSCH: Right.

4               JUDGE KETHLEDGE: -- kind of the argument. I just  
5       wonder what your response is --

6               MR. BURSCH: Yeah. I'll get--

7               JUDGE KETHLEDGE: -- at least on summary judgment.

8               MR. BURSCH: -- you the case name to make the point  
9       about the disparate impact. We don't have to prove it was --

10              JUDGE KETHLEDGE: Is that an equal protection  
11       violation, I guess is my question?

12              MR. BURSCH: Yeah, it is.

13              JUDGE KETHLEDGE: They're really not worried -- they  
14       have no interest in -- they just don't care if they're  
15       thwarting black preferred candidates or not, they just want to  
16       get more Democratic candidates, let's say.

17              MR. BURSCH: Right. If it has the effect of  
18       disenfranchising black voters and that was a primary  
19       consideration in drawing the lines then, yes, that is an equal  
20       protection problem, so --

21              JUDGE KETHLEDGE: And if it was a primary  
22       consideration.

23              MR. BURSCH: Which it clearly was.

24              JUDGE KETHLEDGE: Let's say they're indifferent, they  
25       don't care.



1 MR. BURSCH: Well, they cared about the black voters  
2 because just as a matter of geographic -- geography here.

3 JUDGE KETHLEDGE: But they don't care about the  
4 effect. Don't they have to care about the effect --

5 MR. BURSCH: No.

6 JUDGE KETHLEDGE: -- for there to be an equal  
7 protection violation?

8 MR. BURSCH: No, they do not have to care about the  
9 effect any more than if Republicans wanted to elect more  
10 Republicans and so they packed black voters into Republican  
11 leaning districts, and they didn't do it because they wanted  
12 to hurt black voters, they wanted to do it to elect more  
13 Republicans. That would be every bit as much of an equal  
14 protection violation as what's happening here.

15 JUDGE KETHLEDGE: Do you think the last plan which  
16 did pack black voters pretty -- in high concentrations in  
17 certain districts to the benefit of Republicans, most folks  
18 would say, do you think that was -- I guess that wouldn't be a  
19 violation.

20 MR. BURSCH: It wouldn't be a violation because they  
21 allowed the lines to fall naturally where the voters were.  
22 What happened was, you've got a highly concentrated group of  
23 black voters in Detroit. That's why they know that there are  
24 VRA issues when you get to Detroit, and what the Republicans  
25 did, they let the lines fall where they fell. With the

1 Democrats they took those -- and they make these  
2 bacon-mandered districts, they look like pieces of bacon,  
3 stretching out into Oakland County, stretching out into Macomb  
4 County so they can dilute the impact of those Democratic  
5 voters all being in the same district. Well, they were doing  
6 it specifically because they were black voters and they did it  
7 with racial quotas, and so the fact that they may not have  
8 been trying to hurt the black voters doesn't matter. The fact  
9 that they did hurt the black voters, 20 percent reduction in  
10 the black legislative caucus from this area, is all the  
11 evidence we need of an equal protection violation.

12 JUDGE KETHLEDGE: When you come back give me the case  
13 that --

14 MR. BURSCH: I will.

15 JUDGE KETHLEDGE: -- you think supports the  
16 proposition that the Commission -- it doesn't matter whether  
17 the Commission cares about the effect on minority voters.

18 MR. BURSCH: Yeah. I understand that's an important  
19 piece of this. I believe I'm under 10 minutes now, so unless  
20 you have any more pressing questions, I'm going to try to save  
21 a little time for response in rebuttal. Thank you.

22 JUDGE KETHLEDGE: Thank you, Mr. Bursch. Mr. Raile.

23 MR. RAILE: Thank you, Your Honor. May it please the  
24 Court, I'm Richard Raile for the Commission, and just to be  
25 clear, am I in this phase arguing my summary judgment motion?

1 JUDGE MALONEY: Yes.

2 MR. RAILE: All right. Although some of what I say  
3 will rebut my friend, Mr. Bursch, who said many things that I  
4 do not agree with --

5 JUDGE MALONEY: Surprise, surprise.

6 MR. RAILE: I'll begin the Gingles preconditions and  
7 I'll address the threshold deficiencies at the end.

8 Mr. Bursch just cherry-picked his favorite elections  
9 from the area and, in fact, shows that, even taking it in his  
10 own terms, there's not a Voting Rights Act violation because  
11 in the very exhibit, the demonstrative that he showed the  
12 Court there are five black -- excuse me, four black preferred  
13 wins, four --

14 JUDGE KETHLEDGE: Are you talking primary or general?

15 MR. RAILE: I'm talking about this.

16 JUDGE KETHLEDGE: I know. But are we talking wins --

17 MR. RAILE: This is primaries.

18 JUDGE KETHLEDGE: Primaries.

19 MR. RAILE: These are the Bursch cherry-picked  
20 elections.

21 JUDGE KETHLEDGE: Well, we don't need some of these  
22 characterizations.

23 MR. RAILE: Fair enough. Four wins for black  
24 preferred candidates, four losses for black preferred  
25 candidates, two that lacked cohesion, meaning they don't show

1 the second Gingles precondition, and one with a lack of  
2 evidence.

3 In Clark versus the City of Cincinnati the Sixth  
4 Circuit held that a 47 percent success rate for black  
5 preferred candidates was a failed VRA claim, the plaintiffs  
6 lost, because to establish the third precondition the  
7 plaintiffs have to show that the black preferred candidate  
8 usually loses. 47 percent success rate -- even under  
9 50 percent -- showed that the black preferred candidate does  
10 not usually lose. That's the Sixth Circuit's word on this.

11 Mr. Bursch has identified a case that's no better for  
12 him than Clark against the City of Cincinnati. There is,  
13 phrased in the best possible light for him, a 50/50 black  
14 preferred candidate success rate. Gingles three is not shown.  
15 You can look at them together. You can look at them  
16 individually. It doesn't work. We have, in framing our  
17 summary judgment motion, gone district by district as the  
18 Supreme Court has directed again and again and again, and  
19 there's a reason for that. In, for example, Senate District 7  
20 there's no voter who is also a voter in Senate District 8.  
21 Plaintiffs want to take Senate District 8 to trial because of  
22 the outcome there. As Mr. Bursch said, we're not moving for  
23 summary judgment on Senate District 8. There are significant  
24 material fact disputes that preclude him from obtaining  
25 summary judgment, but that entitles, at best, the plaintiffs

1 to a trial on Senate District 8, not on other districts that  
2 have different voters and different success rates.

3 JUDGE KETHLEDGE: I mean, eight does look like  
4 there's pretty strong white bloc voting against the black  
5 preferred candidate.

6 MR. RAILE: And we have not -- we are not asking for  
7 judgment as a matter of law. There's a material fact dispute.

8 JUDGE KETHLEDGE: Which is?

9 MR. RAILE: It's at -- our expert, Doctor Palmer, at  
10 joint appendix 134 says that this election result is  
11 idiosyncratic and it is not probative as to what future  
12 elections are likely to show because the white preferred  
13 candidate drew national attention from a speech that went  
14 viral on YouTube and obtained an amount of funding that is  
15 unusually high for these races, so that's not enough to strike  
16 it down.

17 In addition, as Judge Selya points out in *Uno versus*  
18 *the City of Holyoke*, you need a pattern of losses of black  
19 preferred candidates, one election does not usually cut it.  
20 My friend, Mr. Bursch, just said that this case is unusual in  
21 having actual election results. That is not true. Generally  
22 Voting Rights Act cases are brought either later in the decade  
23 or they're brought to challenge at large systems that have  
24 existed potentially for decades. It is rare that they're  
25 brought this early, and when they are, what litigants depend

1 on is reconstituted election analyses taking state-wide  
2 elections and reconstituting them within the districts to show  
3 that a minority preferred candidate will not win. That can be  
4 probative --

5 JUDGE MALONEY: So how many elections do you need  
6 with this map to know there is a problem?

7 MR. RAILE: In --

8 JUDGE MALONEY: Or that there is no problem?

9 MR. RAILE: In Gingles there were three election  
10 cycles.

11 JUDGE MALONEY: So that's through the 26th election  
12 in the House.

13 MR. RAILE: In this case that would be so. I am not  
14 setting that as an essential vehicle. There are several ways  
15 that plaintiff could avoid this problem. One, it could go to  
16 exogenous elections and it could superimpose those on the  
17 district and demonstrate a lack of success in those districts.  
18 It could actually go lower, at the county level to county  
19 commissioner races or city races and things like that, and  
20 there is case law about that. The plaintiffs are not doing  
21 that. The plaintiffs are arguing that based on a single  
22 election result and a single district they're entitled to  
23 judgment as a matter of law, and I'm skipping a little bit  
24 ahead into rebutting their argument on this.

25 JUDGE KETHLEDGE: That's fine.

1 MR. RAILE: But they're not entitled to summary  
2 judgment on any of this. They cite no case where anyone has  
3 ever won summary judgment in anything remotely like this. The  
4 Court is not permitted to weigh evidence to determine which  
5 elections are most probative at this stage. We have a  
6 material fact dispute at joint appendix 134.

7 The same can be said about Senate District 1. Our  
8 position is that there's no cohesion in this district and that  
9 can be seen at joint appendix 134. Our expert opines that  
10 given the levels of statistical uncertainty in the estimates,  
11 it is unclear who the black preferred candidate is. There is  
12 no cohesion. Gingles two is not met as to Senate District  
13 Number 1.

14 JUDGE KETHLEDGE: Whether it's at -- I'm just  
15 curious. I mean, whether it's at this stage or some later  
16 stage of litigation like this, I mean, to what extent when we  
17 have a fragmented preference, I guess, for black primary  
18 voters, to what extent do we take into account that black  
19 primary voters clearly, it would seem, are favoring candidates  
20 who are themselves black and whites favoring whites? Doesn't  
21 that -- isn't that probative of cohesion and bloc and it's  
22 more just a fortuity that we have multiple candidates of  
23 races?

24 MR. RAILE: It depends on the circumstances. The  
25 evidence --

1 JUDGE KETHLEDGE: Is it a coincidence that it's  
2 aligned that way?

3 MR. RAILE: The evidence doesn't show that. Very  
4 often the black preferred candidates, even in elections that  
5 Mr. Bursch chose to highlight, are voting for the white  
6 candidate so that's -- it's not the case that black  
7 candidates -- black voters are voting for black candidates.  
8 It's just not true.

9 JUDGE KETHLEDGE: Well, I'm just looking at Senate  
10 District 1, and I do have this sort of district-by-district  
11 mindset, just as fair notice, and I get your point that there  
12 isn't a single candidate that gets more than 50 percent  
13 support for black voters in this primary, but, you know, I  
14 mean, the black candidates are definitely -- they're getting  
15 way more -- they're getting almost total support and so --  
16 right? I mean --

17 MR. RAILE: I would love to explain this, because  
18 it's more complicated.

19 JUDGE KETHLEDGE: So if it's one-on-one in the next  
20 election it could be harder to get crossover voting if the  
21 whites are doing the same.

22 MR. RAILE: It may or it may not, but it's the  
23 plaintiffs' burden to prove that.

24 JUDGE KETHLEDGE: Right. And I'm not saying -- all  
25 I'm going toward is just that this might still be probative of



1 cohesion and bloc voting notwithstanding the numbers 24 and  
2 34.

3 MR. RAILE: That's why we didn't move for summary  
4 judgment. We recognized the summary judgment standard. We're  
5 the ones arguing to the summary judgment standard, but this  
6 chart is problematic for several reasons. One, what our  
7 expert is saying is that those numbers 34 and 24 are estimates  
8 and given statistical uncertainty is actually a statistical  
9 dead heat. Second, when you have fragmented votes and you  
10 don't even have a clear plurality winner -- the case law is  
11 clear, we cited the Levy case out of the Fourth Circuit which  
12 cites in turn a Fifth Circuit case that says there's not  
13 cohesion. The black community has to be cohesive. They have  
14 to rally around a candidate. If you have a fractured race,  
15 even with many candidates, it's understandable, but that race  
16 cuts against the cohesion.

17 If the plaintiff wants to prove Gingles two, the  
18 plaintiff needs to find some other evidence. Plaintiffs do  
19 that. Here, they don't have anything.

20 On the majority of the districts -- and let's be  
21 clear, we're really talking in this case about three districts  
22 above 35 percent black voting age population or BVAP where the  
23 black preferred candidate loss. In every other case the black  
24 preferred candidate won or there was not black cohesion under  
25 the legal standard for cohesion.

1           I can walk the Court through all of them. They're  
2 listed in our brief, in our summary judgment motion where we  
3 go district by district, and our point is simple. You heard  
4 Mr. Bursch say many things about digging into the elections  
5 and getting into the facts, but the problem is for him that he  
6 has to prove the existence of Gingles three. He has to prove  
7 legally significant white bloc voting. We do not have to  
8 disprove that precondition, and everything that you heard Mr.  
9 Bursch say this morning, he stood up and said -- this  
10 afternoon, he stood up and said this case all depends on the  
11 Commission's theory of white crossover voting. That's not  
12 true. Nothing depends on the Commission's theory of white  
13 crossover voting. What -- this depends on their ability to  
14 prove all of the Gingles' preconditions. If they don't have  
15 evidence explaining away our evidence, gets them to a zero  
16 zero tie.

17           JUDGE KETHLEDGE: So they bear the burden of proof.

18           MR. RAILE: Yes.

19           JUDGE KETHLEDGE: Well, we get that.

20           MR. RAILE: This is a simple --

21           JUDGE KETHLEDGE: I think what he --

22           MR. RAILE: This is a point on those preconditions  
23 and I can --

24           JUDGE MALONEY: Why should we ignore Senate District

25           8?

1 MR. RAILE: You should not ignore Senate District 8  
2 when examining Senate District 8. What I'm saying is as to,  
3 for example, Senate District 3 --

4 JUDGE MALONEY: No. I want to talk about -- if I  
5 appreciate your expert's opinion, a 95 to four split of white  
6 voters is not significant?

7 MR. RAILE: It's a triable fact question.

8 JUDGE MALONEY: 95 to four?

9 MR. RAILE: Yes.

10 JUDGE MALONEY: Seriously?

11 MR. RAILE: Yes, Your Honor, because we have an  
12 expert who is opining that that is not probative of future  
13 races here. It is not the Court's role to weigh that dispute  
14 at this stage. It's triable. That's our argument on Senate  
15 District 8.

16 As to the other districts that surround it, for  
17 example, Senate District 3 where the black preferred candidate  
18 won and won 76 percent of the black vote, they can't take  
19 Senate District 3 to trial based on evidence about Senate  
20 District 8. They get to take Senate District 8 to trial.

21 JUDGE KETHLEDGE: I understand your point and -- but  
22 I think that we -- results like this in a neighboring district  
23 might have some probative value about the prevalence of white  
24 bloc voting, you know, three blocks away.

25 MR. RAILE: And if that's the way the Court looks at

1 it, it has to acknowledge that the evidence can cut both ways,  
2 and when you have a case where --

3 JUDGE KETHLEDGE: Sure, that's fair.

4 MR. RAILE: -- in a Democratic primary the success  
5 rate of the black preferred candidates is 75 percent across  
6 all of these districts, then -- if you look at it that way  
7 then we still have well more than the Gingles' standard,  
8 which, again, is not to guarantee the minority preferred  
9 candidate wins but to have an equal opportunity. A 50 percent  
10 success rate is the Gingles three mark. Looking at all the  
11 district together, we're at 75.

12 JUDGE MALONEY: Are you -- that 75 is primary  
13 elections?

14 MR. RAILE: Yes.

15 JUDGE MALONEY: Okay.

16 MR. RAILE: And I would -- I'll address the issue of  
17 general versus primary in the context of our narrow tailoring  
18 argument. It matters more there, but for purposes of our  
19 summary judgment motion against -- on offense, we're looking  
20 at Democratic primaries, and there's a 75 percent success rate  
21 in those primaries. If you narrow it down to the 11 districts  
22 that they said in their brief was most probative and they put  
23 in the joint appendix, there's a 54 percent success rate, so  
24 in all of those cases the Gingles three standard is not met,  
25 so look at it regionally, look at it district by district,

1 either way we're on solid footing.

2 JUDGE KETHLEDGE: Which case says that a 50 percent  
3 success rate is the Gingles three mark?

4 MR. RAILE: So in the Sixth Circuit it's actually  
5 lower. It's Clark versus Cincinnati, even a 47 percent  
6 success rate was good enough there. My understanding of the  
7 law in other circuits is they generally apply a 50 percent  
8 rate. I believe the Meeks decision in the Eleventh Circuit  
9 says that. I don't have the cite off the top of my head.  
10 We've relied on the Sixth Circuit in this case, but generally  
11 you're talking about usually. I mean, Gingles itself says  
12 usually.

13 JUDGE KETHLEDGE: That's your paraphrase, the  
14 50 percent. There's not a case -- like a Supreme Court case  
15 that sort of lays that out succinctly.

16 MR. RAILE: There are Circuit Court cases that lay  
17 that out.

18 JUDGE KETHLEDGE: I'm more interested in people who  
19 can reverse us, so we're talking about the Supreme Court.

20 MR. RAILE: Fair enough.

21 JUDGE KETHLEDGE: Yeah.

22 MR. RAILE: The Gingles standard is usually, and the  
23 Sixth Circuit says usually 47 percent doesn't work for that.

24 JUDGE KETHLEDGE: I get it.

25 MR. RAILE: I don't know if the Supreme Court has

1 directly addressed that question.

2 JUDGE KETHLEDGE: Okay. So there's not a cut and  
3 dry. Go ahead.

4 MR. RAILE: I want to address briefly the threshold  
5 issues. One of the districts that Mr. Bursch highlighted was  
6 House District 26. That district was challenged by the  
7 plaintiff, Norma McDaniel, in the Detroit caucus case. She  
8 received a final judgment on the merits in that case rejecting  
9 the VRA claim. That's res judicata. That defeats the claim  
10 against House District 26 and Senate District 5 which she also  
11 challenges.

12 Judge Kethledge mentioned a few districts of very low  
13 BVAP that are not in areas that can easily be redrawn as  
14 majority-minority districts. House District 2 is an example.  
15 You can see that at joint appendix 234. It's down here well  
16 south of that pocket of black, which is, I guess, purple  
17 representing the black voters. It's too far south to be  
18 reasonably configured.

19 JUDGE MALONEY: Was it down river?

20 MR. RAILE: Yes, Your Honor, that's right. It's too  
21 far south to be reasonably configured.

22 JUDGE KETHLEDGE: Is that the only one you would  
23 point us to in this respect that, you know, it's too much of  
24 an island to be reasonably configured, just so I understand  
25 your argument? HD2, I get that. Are there any other House or

1 Senate?

2 MR. RAILE: Senate District 5 and Senate District 11,  
3 and they're in a similar scenario.

4 I would like to address the racial gerrymandering  
5 claim, because there's a lot of confusion about what the  
6 standard is. There are two steps in a racial gerrymandering  
7 claim, both of fact intensive. The first step the question is  
8 whether race was the predominant factor in the creation of a  
9 given district line. That is a district specific analysis,  
10 and the one case that I'm aware of that went -- where a  
11 plaintiff won summary judgment on the issue was unanimously  
12 reversed in the Supreme Court. That's Cromartie, Cromartie  
13 one, so that's a fact intensive question, and the question is  
14 whether the racial goal predominated over other goals and it  
15 is necessarily a weighing of the many factors.

16 We have in our summary judgment motion restricted our  
17 argument to one legal issue which is that the plaintiffs have  
18 actually stipulated that political goals predominated over  
19 racial goals. That is at joint --

20 JUDGE KETHLEDGE: If I can just ask you again about  
21 kind of -- as I had Mr. Bursch about the standard itself here.  
22 I mean, you say did the racial goal predominate, and so that,  
23 I think, implies that there was an active intention to have  
24 some effect on race -- on, you know, voters of a certain race.

25 MR. RAILE: It is an intent to -- it is a racial

1 intent, intent to use race. It doesn't necessarily have to be  
2 an adverse intent. It's just a racial intent. So it --

3 JUDGE KETHLEDGE: Intent as -- for what? Intent to  
4 have what happen?

5 MR. RAILE: To place a large number of voters within  
6 or without a given district on the basis of race.

7 JUDGE KETHLEDGE: Okay.

8 MR. RAILE: And that's Miller against Johnson.

9 JUDGE KETHLEDGE: That's helpful.

10 MR. RAILE: I think this discussion has been confused  
11 with what we call a vote delusion claim under the Fifteenth  
12 Amendment where there is an intent to dilute votes.  
13 Plaintiffs have not brought that type of case. It is not what  
14 we're litigating here. The question is whether the racial  
15 goal predominates over other reasons that voters are getting  
16 moved around, like communities of interest, like politics,  
17 like compactness, like other constitutional criteria; which  
18 one in each district had the overriding affect on the lines of  
19 that specific district. It's district by district and the  
20 courts that do this walk through each one in findings of fact  
21 with a bold heading that says, district 12, district 14, and  
22 they talk about the evidence as to that district.

23 Plaintiffs in this case have answered a request to  
24 admit stating that the Commission's overriding goal was  
25 political. It wanted to draw districts out of Detroit so that



1       there could be a fairer state-wide partisan vote share  
2       pursuant to the Michigan constitution's partisan fairness  
3       requirement. Our position on this for our summary judgment  
4       motion is simply that this admission that politics  
5       predominated precludes them from arguing at trial that race  
6       predominated. Cromartie two is the legal argument on that. I  
7       have lots to say about predominance but it's more in the  
8       defensive posture.

9               JUDGE KETHLEDGE: I think -- I mean, we do understand  
10      your argument about the admission, but I think we're going to  
11      want to talk more about this issue than that. I mean, you  
12      said under Miller an intent to place a large number of voters  
13      in a certain district based on race --

14             MR. RAILE: Yes.

15             JUDGE KETHLEDGE: -- is the forbidden intent.

16             MR. RAILE: It is the intent that triggers strict  
17      scrutiny. It shows predominance.

18             JUDGE KETHLEDGE: It's what shows predominance, and  
19      I'm just wondering why isn't that satisfied hypothetically in  
20      a district where the Commission or a similar body says, we  
21      don't want to have more than, say, 40 percent black voter  
22      population in any district because we're kind of -- period.  
23      We'll stop right there, you know, which is what I think that  
24      chairperson said was happening.

25             MR. RAILE: So, first off, there's two problems with

1 this. First is that it didn't actually happen. Most of the  
2 districts they're challenging went above that. In the case  
3 called Shaw two, which is Shaw against Hunt, the Court said --  
4 the Supreme Court said that race has to be the one criterion  
5 that could not be compromised. If their allegation is that  
6 there was a 40 percent cap and the cap was routinely  
7 compromised, race did not predominant.

8 JUDGE KETHLEDGE: Let's forget about that and just my  
9 hypo, somebody said that and they meant it.

10 MR. RAILE: If they actually applied it to the  
11 district lines you would have to look at the qualitative  
12 effect that the cap had on the district lines, and here's why.  
13 Some quotas, as my friend Mr. Bursch called them, will have an  
14 outsized effect on the movement of people and some were not.  
15 Suppose, for example, that I have a district that I'm  
16 configuring and it's at 65 percent BVAP and I say, I will have  
17 a quota that it will not go below 40 percent BVAP. That is  
18 not a very constraining goal. I don't have to think about it  
19 that much. I don't have to move very many people on that  
20 basis, and I can go about with my other criteria and the  
21 racial goal does not predominate. The case on this is called  
22 Bethune-Hill versus the Virginia State Board of Elections --

23 JUDGE KETHLEDGE: I understand what you're saying.

24 MR. RAILE: -- and in that case there was a  
25 55 percent black voting age population floor. That was found

1 as fact at trial to have been applied and met in every  
2 district, unlike in this case where we haven't had a trial and  
3 no quota has been found to exist and no quota could be found  
4 to have been met. In that case the Supreme Court entertained  
5 the argument by the plaintiffs' lawyers in that case that is  
6 exactly what Mr. Bursch said here.

7 JUDGE KETHLEDGE: That was a floor and here's a cap  
8 and I can see a difference between those two as to the success  
9 of black preferred candidates.

10 MR. RAILE: That would go to the narrow tailoring  
11 analysis but --

12 JUDGE KETHLEDGE: Well, not necessarily. We're just  
13 talking about the predominance requirement, and if they  
14 have -- if they're trying to limit the percentage of black  
15 voters in districts to a certain number, and to your point  
16 earlier, which is an excellent point, and this limit is  
17 actually affecting where they draw the lines, it's just not  
18 something that didn't matter in the end, then isn't that  
19 predominance, even if they're just trying to get more  
20 candidates of one party or another elected?

21 MR. RAILE: If you have evidence of all of those  
22 things and rate that evidence.

23 JUDGE KETHLEDGE: Just in that hypo.

24 MR. RAILE: I think it could be.

25 JUDGE KETHLEDGE: Well, why wouldn't it be? Why

1       isn't it, period? It's just a hypo. I'm not saying, oh, now  
2       I got you.

3               MR. RAILE: Yes. If that was the predominant goal  
4       and it were a cap, it could be. I'm not arguing that a cap  
5       can't predominate. That's not what we argued in this case.  
6       What we're saying is this is an intensely fact intensive  
7       question because you have to figure out just how constraining  
8       it was.

9               JUDGE KETHLEDGE: Let's say it was constraining.  
10       Let's say they started with some lines and they said, you  
11       know, we need to get it down to 40 percent, or whatever it  
12       might be, and they changed the lines, so the cap does dictate  
13       the lines in the end, that would seem to satisfy the standard  
14       that you met.

15              MR. RAILE: Yes.

16              JUDGE KETHLEDGE: I'm not saying the facts align with  
17       this here. I'm just trying to understand the law.

18              MR. RAILE: I think Your Honor has accurately  
19       described the law.

20              JUDGE KETHLEDGE: I appreciate the straight answer.

21              MR. RAILE: The plaintiffs have not even mentioned --  
22       if you read the predominant section of their brief they  
23       haven't even mentioned a district, not any district, what was  
24       the cap, how constraining was it, what traditional principles  
25       were --

1 JUDGE KETHLEDGE: I know. That's not our case. It's  
2 always -- it's okay. That's fine.

3 MR. RAILE: Yeah. And that's why they're very far  
4 from summary judgment on that, and I think, frankly, their  
5 showing across three briefs have been so weak under that  
6 standard that the Court would be entitled to enter summary  
7 judgment for the Commission on that basis because they lack  
8 anything like the evidence that they need.

9 JUDGE KETHLEDGE: What about Mr. Bursch's argument  
10 that a disparate effect on minority voters can establish  
11 predominance? I mean --

12 MR. RAILE: That's not right. I think he may have  
13 been conflating the Section 2 standard, which is completely  
14 different where he's correct, as to Section 2 of the Voting  
15 Rights Act a discriminatory effect on its own without intent  
16 can establish a claim. For a racial gerrymandering claim,  
17 this is an equal protection claim, it's all about legislative  
18 intent. The effect is not the inquiry. It is the intent.

19 That does lead me to the narrow tailoring argument  
20 which I'm going to do as quickly as I can because I've already  
21 gone 25 minutes. The basic issue with narrow tailoring is  
22 that the Commission hired an expert, looked at voting  
23 patterns, concluded that there was a risk of Voting Rights Act  
24 liability in the general elections in the area. And I want to  
25 repeat that very clearly. It's the general elections

1 principally that Doctor Handley is concerned about, and you  
2 can see this at joint appendix 30 through 31. My friend Mr.  
3 Bursch says that our own findings somehow undermine our claim  
4 under the Voting Rights Act, but he's conflating general and  
5 primary elections. The Commission has to be concerned about a  
6 Section 2 challenge to either the general election system or  
7 the primary election system. Doctor Handley identified that  
8 problem at joint appendix 30 through 31 looking at general  
9 elections.

10 The question, then, when you have to use race because  
11 of the Voting Rights Act, you have to consider these issues,  
12 the question becomes how do you use race? The problem that  
13 many legislatures had last decade and resulted in more than 50  
14 districts being struck down throughout the United States was  
15 that they picked a number like 50 or 55 percent and applied it  
16 across districts without a functional analysis of district  
17 performance. That, the Supreme Court said in Cooper versus  
18 Harris, is not narrow tailoring. Narrow tailoring has to look  
19 at what's the actual performance.

20 The strong basis in evidence for us is at joint  
21 appendix 42 through 49 where Doctor Handley performs a  
22 sophisticated algebraic calculation to do exactly the  
23 functional analysis commanded in Cooper versus Harris. That's  
24 the strong basis in evidence.

25 It is also true that Doctor Handley looked at primary

1 elections. The primary elections were less informative  
2 because they were inconclusive. The Court can see this at  
3 joint appendix 32 through 37.

4 JUDGE KETHLEDGE: She said she didn't really have  
5 data on those.

6 MR. RAILE: That's at joint appendix 48 where she  
7 says it's inconclusive, there's not enough data. At 32  
8 through 37 she shows what she has, and it shows that in most  
9 cases voting is not polarized. There's not legally  
10 significant bloc voting in the vast majority of cases. So  
11 that on its own doesn't tell the Commission much about what to  
12 do with race. It's really the general elections that are  
13 driving it.

14 Doctor Handley did her best at joint appendix 49  
15 through 50 where she did a crude analysis that does include  
16 primaries and does show that the black preferred candidates  
17 are able to win in districts even as low as 26 percent BVAP.  
18 She -- yes, Your Honor.

19 JUDGE KETHLEDGE: On page 48 she says, as the  
20 percentage -- I'm quoting her. It's the end of the second  
21 full paragraph. As the percentage black VAP of proposed  
22 districts decreases, which is what happened under this plan,  
23 it may become more challenging for black preferred candidates  
24 to win not only the general election but the Democratic  
25 primary but only if voting in Democratic primaries is racially

1 polarized. That all sounds straightforward. Unfortunately,  
2 it is not possible to ascertain exactly how much more  
3 difficult it would be or even if it would be more difficult  
4 given the lack of primary -- Democratic primary election data,  
5 and I guess when I read that I thought, so are we just taking  
6 a flyer with this plan here, or is it ultimately, you know, do  
7 we just sort of, you know, put our faith in pages 49 through  
8 55 or whatever?

9 MR. RAILE: What you do is you put your faith in the  
10 earlier pages that I cited where she looks at the general  
11 elections, because that's where the issue is. The problem --

12 JUDGE KETHLEDGE: How is that where the issue is? In  
13 what sense?

14 MR. RAILE: Because that's where polarized voting was  
15 shown. In the last sentence that you read, but only if voting  
16 in Democratic primaries is racially polarized. If you don't  
17 know that voting in Democratic primaries is racially polarized  
18 then you don't have a strong basis in evidence to do anything  
19 with race.

20 That was the problem in Virginia. 11 districts were  
21 struck down as racial gerrymandering. There wasn't Democratic  
22 primary election data available except in HD 75. That  
23 district was actually upheld by the Supreme Court under the  
24 narrow tailoring analysis because there was a functional  
25 analysis as to District 75, but on remand the lower court said



1     you applied the 55 percent floor to districts that were  
2     different, in different areas and even the neighbor districts  
3     and struck down all of those as not being narrowly tailored.  
4     This inconclusive statement tells us under the equal  
5     protection standard that there's little to be done. I agree.

6             JUDGE KETHLEDGE: Yeah. I get your point there. I  
7     was thinking back more about VRA, frankly, when I made that  
8     remark.

9             MR. RAILE: Yes. It shows you how weak their VRA  
10    claim is because they staked everything on the primaries, and  
11    by the way, just --

12            JUDGE KETHLEDGE: Well, I mean -- okay. I will say,  
13    you know, without having gone through all the data and so on,  
14    it doesn't strike me as a fantastic proposition that there  
15    would be white bloc voting in these districts. That doesn't  
16    seem pretty farfetched and --

17            MR. RAILE: Correct.

18            JUDGE KETHLEDGE: -- low and behold we do have some  
19    results that seem to bear that out.

20            MR. RAILE: Same is true in North Carolina, and the  
21    Supreme Court struck down the majority-minority districts as a  
22    racial gerrymander. The question isn't whether there's white  
23    voting preferences for a white preferred candidate. There can  
24    be support -- majority support for a candidate, but if there's  
25    enough white crossover voting for the black candidate, the

1 district can still perform.

2 JUDGE KETHLEDGE: Correct.

3 MR. RAILE: And in Cooper versus Harris the Court  
4 looked at general election data involving an incumbent,  
5 Representative Butterfield, who had been sitting in that seat  
6 since 2004 and said Representative Butterfield can win this  
7 district. There isn't a strong basis in evidence for a  
8 majority-minority district. We're striking it down.

9 In this case the Commission did the only thing that  
10 was available, looked at the data it had. This is as good as  
11 it gets. If Cooper versus Harris gets struck down when they  
12 draw 50 percent districts on the same facts and these  
13 districts get struck down, there's no way to redistrict.  
14 There's nothing the Commission could have done better than  
15 this.

16 JUDGE KETHLEDGE: One thing I would say is sometimes  
17 the Commission might need to worry about general elections and  
18 sometimes they don't. I mean, there are some districts that  
19 are, you know, dark red, or whatever the phrase is, or dark  
20 blue, and you win the primary and you've won the general and  
21 everybody knows it and so there are some districts where this  
22 business about the general is just utterly irrelevant and the  
23 whole shooting match is in the primary, and if we're taking  
24 the majority -- if we're going -- I mean, it is remarkable.  
25 In the City of Detroit with, you know, 77 percent African

1 American population and not one single Senate district with a  
2 majority black electorate? You kind of have to go out of your  
3 way to do that.

4 MR. RAILE: The Court may find that based on the  
5 evidence at trial. We're very far from a finding like that,  
6 and as far as narrow tailoring goes, this right here shows in  
7 the general elections -- I've got the chart, joint appendix  
8 31, Doctor Handley's finding, polarization in the general  
9 elections. That's why you play the game. It's certainly true  
10 that in some cases it wouldn't be a problem. The Commission  
11 has to be concerned when it's drawing the map about every type  
12 of VRA claim that can be brought, not just the plaintiffs'  
13 claim in this case.

14 I've gone for 35 minutes and I would like to reserve  
15 some time for more rebuttal.

16 JUDGE MALONEY: Thank you. Mr. Bursch, response to  
17 the defendants' motion.

18 MR. BURSCH: First I want to clean up two items that  
19 I left from the opening presentation. First, Judge Kethledge,  
20 House District 2, you could easily take the black population  
21 that was there and bump it up into House District 1 which is  
22 at 38 percent BVAP. That's at page -- joint appendix 324, and  
23 I'll show you the map where you can see the little bit that's  
24 been fractured off.

25 JUDGE KETHLEDGE: Does Mr. Trende say -- is this part

1 of what he did --

2 MR. BURSCH: It's on the map but he doesn't discuss  
3 it in his report.

4 JUDGE KETHLEDGE: Doesn't that -- okay, it's on the  
5 map.

6 MR. BURSCH: It's on the map. You can visually see  
7 it on that page 324 of the appendix. It's the bottom  
8 illustration. And then my friend Mr. Raile mentioned Senate  
9 District 5 and 11. Senate District 5 was part of a black  
10 majority-minority district in the 2011 Senate plan. That's in  
11 our response brief pages 12 to 14. And then Senate District  
12 11, Trende did address that directly, and that's at 389 to 90  
13 of the joint appendix, so that's all I had to say about  
14 Gingles one.

15 JUDGE KETHLEDGE: It's kind of an initial matter  
16 stuff, you haven't addressed the jurisdictional issues.  
17 There's no way your current plaintiff or HD whatever it is,  
18 the person -- Mr. Black who moved.

19 MR. BURSCH: Yes.

20 JUDGE KETHLEDGE: There's no way he has standing  
21 right now. TransUnion all day long.

22 MR. BURSCH: We're not going to contest that.

23 JUDGE KETHLEDGE: Okay. And so that district is out,  
24 right?

25 MR. BURSCH: It is.

1 JUDGE KETHLEDGE: Okay. I appreciate that straight  
2 answer.

3 MR. BURSCH: Yeah.

4 JUDGE KETHLEDGE: And as to the -- I guess there's --  
5 I mean, for the Michigan Supreme Court decision that we have  
6 here --

7 MR. BURSCH: Yes. We do not concede that.

8 JUDGE KETHLEDGE: You do not concede that?

9 MR. BURSCH: We do not.

10 JUDGE KETHLEDGE: So that's one House district and  
11 one Senate district, right?

12 MR. BURSCH: Correct.

13 JUDGE KETHLEDGE: It sure reads like they said the  
14 plaintiffs have not presented sufficient allegations or proof  
15 or something. It sounds like a merits decision on their part.  
16 You criticize the process, but we have to respect their merits  
17 decisions, and I'm still struggling to see how that's not a  
18 merits decision that follows this.

19 JUDGE MALONEY: Following up on that, didn't the  
20 plaintiff make a concession that they didn't want to provide  
21 any further evidence that was before the Supreme Court?

22 MR. BURSCH: That was disputed. There's a question  
23 whether he meant that concession the way that the majority  
24 interpreted it, and then later he kind of went back on that,  
25 but that's not where we're resting our argument.

1           Judge Kethledge, if there had been a legal analysis  
2     of the VRA claims then I think that we would be dead in the  
3     water, but they don't do that. All they do is they say  
4     dismissed, and the Michigan Supreme Court, as we lay out in  
5     our response brief, has a mechanism for simply not taking  
6     cases within its original jurisdiction in its discretion, and  
7     this looks very much like one of those cases. The dissent  
8     says, look, there's no substantive analysis in the majority  
9     opinion at all. The majority doesn't disagree with that, and  
10    the key point for res judicata purposes is this Court can't do  
11    something that would be in conflict with their analysis, and  
12    if you adopt what we're saying here, either on summary  
13    judgment or at trial, there would be no conflict between  
14    anything that you say and a single word of that opinion  
15    because it is that lacking in merits analysis. The Supreme  
16    Court has said that when that happens, that's not subject to  
17    res judicata.

18           JUDGE KETHLEDGE: How about collateral estoppel in  
19    the sense that one could have brought a claim and didn't or  
20    made an argument?

21           MR. BURSCH: If the claim that she brought was  
22    rejected on a discretionary basis, which I think is the best  
23    fit -- if you -- in our response brief we have the whole --

24           JUDGE KETHLEDGE: Yeah.

25           MR. BURSCH: They could dismiss it. If that's the

1 best fit, which I think it is, then that wouldn't come into  
2 play because it's as if the case never existed. It was just a  
3 discretionary denial.

4 JUDGE KETHLEDGE: I understand your argument. I'll  
5 let you get on to whatever you want.

6 MR. BURSCH: Another big housekeeping matter. On  
7 page 36 we talk about the Supreme Court case -- and I should  
8 have remembered this --Shaw v Hunt, Shaw v Reno. Shaw v Hunt  
9 says racially gerrymandered district maps are constitutionally  
10 suspect whether or not the reason for the racial  
11 classification is benign or the purpose remedial, and then  
12 Shaw v Reno and Cooper v Harris make some of those similar  
13 points. The thing is under the Equal Protection Clause the  
14 black voters are protected against the use of racial quotas  
15 whether or not they were intentionally trying to hurt black  
16 voters.

17 Now, a couple rebuttal points. This idea that  
18 somehow our best case scenarios in that chart that I presented  
19 end up four to four, well, he focuses on races where the  
20 candidate of choice was not black or you had a black  
21 incumbent, and the courts have said consistently, including  
22 the Sixth Circuit in Sundquist, that those aren't as probative  
23 as the other cases, and while at a summary judgment stage this  
24 Court isn't slicing and dicing facts and, you know, weighing  
25 credibility and things like that, you do have the ability to

1       decide what facts are material, and so if you've got a race  
2       where a nonblack candidate wins, you can say that's far less  
3       material to a finding -- with respect to white crossover  
4       voting than what they're talking about, and then when he says,  
5       you know, four, four, so, you know, if you diminish those our  
6       percentage is much higher, but even the case that he says  
7       supports our proposition, not theirs. In the Cincinnati --  
8       Clark versus Cincinnati case, that was a city council case,  
9       and originally they had a proportional representation rubric  
10      for elections and they changed it to one where you could  
11      select the top nine candidates of your choice, and after  
12      the -- they went through that the black candidates fared more  
13      poorly, and two of the key stats were that 74 percent of the  
14      black -- of the black candidates of choice prevailed overall  
15      but when you focused only on the black candidates it was that  
16      47 percent, and the Sixth Circuit corrected the district court  
17      which looked only at the 74 percent number and instead  
18      analyzed the 47 percent number, the black candidates of  
19      choice, not any candidates that black voters might prefer, and  
20      if you do that here then it's not 50 percent, then it's a much  
21      better number for us, and if you're doing a  
22      district-by-district analysis, you know, this still doesn't  
23      take away from the fact that we're entitled to summary  
24      judgment on SD 1, 8, and House District 8, 11, and 26.

25                   JUDGE KETHLEDGE: What would you say in response to



1 Mr. Raile's argument that one election here isn't enough for  
2 summary judgment and that, you know, for some of these there  
3 were idiosyncractic reasons, like some video that went viral?  
4 It's kind of a big ask to say, okay, one election, SJ, case  
5 over as to that.

6 MR. BURSCH: I think a bigger ask to hypothesize  
7 about a video that went viral when you're talking about 95 to  
8 five and 90 to 10 white crossover voting numbers in district  
9 after district after district. That's simply not a material  
10 dispute of fact.

11 JUDGE KETHLEDGE: How about the fact that it's just  
12 one election?

13 MR. BURSCH: So I wanted to go back to another  
14 cleanup point. Page 8 of our reply brief. This is where we  
15 go out and -- go back and look at some of the older elections.  
16 They don't do this. I mean, their briefing relies almost  
17 entirely on 2022 primary data, but when Mr. Trende goes back  
18 and looks at the previous elections -- this on, again,  
19 page eight of our reply -- the 2014 Senate primary, the vote  
20 -- the black candidate vote shares tended to mirror the BVAP  
21 of district. Again, 2018 Senate primary showed racial  
22 polarization among the same order of magnitude as the  
23 disastrous 2022 primary elections. So, what does that mean?  
24 It means if you take BVAPs that are consistently in the 60 or  
25 higher and you reduce those to 47 percent or below and black

1 candidates are going to have overall numbers that mirror those  
2 of the BVAP, more of them are going to lose, and that's  
3 exactly what happened in 2022 so we don't need to stake our  
4 flag in the ground on 2022. All 2022 does is prove what they  
5 saw in 2018 and 2014 were not aberrations. This is a  
6 consistent pattern of data.

7 And I also want to respond to Mr. Raile's point that  
8 somehow the general elections are the most probative here.  
9 Every single expert in this case agrees that the primaries are  
10 what matter because all of the black and white voters in this  
11 area vote for Democrats in the general.

12 JUDGE MALONEY: How many Republicans won the general  
13 elections in the contested districts?

14 MR. BURSCH: Zero. It was 27 out of 27 Democrats who  
15 prevailed. It is a joke to say we should be looking at the  
16 general election. We have case law on that, too. The Pope,  
17 Galvin, and Baldus cases all make that point, pages 19 to 20  
18 of our opening brief.

19 He also said there's no evidence of black cohesion.  
20 Well, not only is that completely belied by the data, they  
21 admit that there is black cohesion or otherwise they wouldn't  
22 have been able to consider race at all. No black cohesion, no  
23 worries about VRA, then we don't worry about anybody's race,  
24 we just move forward and draw lines in the ordinary way.

25 JUDGE KETHLEDGE: I think Mr. Raile was talking about

1     some specific districts when he said that. Maybe SD 1. I  
2     mean, he was -- you know, he wouldn't -- he was talking about  
3     so the districts --

4             MR. BURSCH: And when he's talking about those  
5     districts typically it's because there are multiple black  
6     candidates and you don't have all the black voters aligning  
7     behind one person, but whether you look at the districts I've  
8     highlighted or you look at the districts across the board,  
9     black voters generally almost overwhelmingly support black  
10    candidates in this area in the same way that the white voters  
11    do, and that's exactly what Doctor Handley concluded. They're  
12    kind of caught between a rock and a hard place on this point  
13    because if there is no black cohesion and there is no white  
14    cohesion then there are no VRA concerns and they should not  
15    have considered race at all in drawing these maps, which they  
16    clearly did. If they admit there's black cohesion and they  
17    admit there is white cohesion then they have got a Section 2  
18    problem for the very reasons that we've stated, so the fact  
19    that you've got the VRA Section 2 claim here and the equal  
20    protection claim here, they can't have it both ways. Either  
21    they're cohesive or they're not, and either way we're entitled  
22    to summary judgment.

23            JUDGE MALONEY: One minute, Mr. Bursch.

24            MR. BURSCH: I will save that for rebuttal.

25            JUDGE MALONEY: Okay. Two of us are considering

1 giving both sides more time for their last argument but I  
2 haven't consulted with Judge Kethledge yet.

3 JUDGE KETHLEDGE: You're in charge, sir.

4 JUDGE MALONEY: Go ahead, Mr. Raile.

5 MR. RAILE: Let me start where Mr. Bursch just ended  
6 because he's not accurately addressing my -- the nuance of my  
7 argument about both primary and general elections.

8 JUDGE MALONEY: What impact does a general election  
9 have on this analysis when the Democratic candidate wins and  
10 the likelihood that the preferred African American candidate  
11 is going to be the Democratic? I'm having trouble  
12 understanding the argument. Go ahead.

13 MR. RAILE: As to the vote -- the problem is they're  
14 conflating our narrow tailoring argument with our Voting  
15 Rights Act argument. Under the Voting Rights Act for their  
16 claim where they have the burden to establish Voting Rights  
17 Act claims we are playing on the Democratic primary playing  
18 field. We are not relying on general elections much. We have  
19 made the argument that they are relevant. It's a very small  
20 part of our defense, and Judge Kethledge was right, we have  
21 challenged black cohesion as to the districts where the data  
22 does not support it, and I've already listed those in the  
23 record.

24 Mr. Bursch has this argument that says we can't  
25 defend the VRA claim and the narrow tailoring section of the

1 equal protection claim at the same time, and that's just  
2 wrong. First of all, it's wrong because we actually drew  
3 districts to be performing districts. Second, it's wrong  
4 because the Commission has to be concerned about all the types  
5 of claims that might be brought. Judge Luttig in Lewis versus  
6 Lexington County (sic) in -- I forget if it was 1995 or 1996  
7 -- explained how the general elections and the primary  
8 elections work. A plaintiff --

9 JUDGE KETHLEDGE: Can I interrupt you for a second?  
10 And it's kind of the same question that Judge Maloney just  
11 asked. In districts where everyone knows the Democratic  
12 candidate is going to win in the general, what VRA -- and so  
13 the black preferred candidate in the general election is going  
14 to win, everybody knows that, 27 out of 27 times, so what  
15 relevance --

16 MR. RAILE: In the --

17 JUDGE KETHLEDGE: Let me finish. What relevance does  
18 a worry about the general election have to complying with the  
19 VRA?

20 MR. RAILE: Because Doctor Handley looked at the  
21 analysis -- look at pages 34 -- and found polarization in  
22 those elections.

23 JUDGE KETHLEDGE: So what? I mean, that's --

24 MR. RAILE: Because if --

25 JUDGE KETHLEDGE: That matters in the primary not in

1 the general.

2 MR. RAILE: It does matter in the general because if  
3 the black preferred candidate loses the general there's also a  
4 Voting Rights Act violation. That's the --

5 JUDGE KETHLEDGE: Right. I'm not trying to give you  
6 a hard time, but -- so hypothetically we have a district that  
7 has 95 percent of the registered voters are Democratic voters,  
8 okay?

9 MR. RAILE: If it's already drawn, sure. But Doctor  
10 Handley did her analysis before they were districts. She's  
11 looking at the counties. She's looking at Wayne County.  
12 She's looking at Oakland County --

13 JUDGE KETHLEDGE: My point is -- I mean, you -- they  
14 want majority -- they want to have some majority black  
15 districts and more of them than there are now. You're saying,  
16 well, we need to be concerned about general election outcomes  
17 and make sure the black preferred candidate's not going to  
18 lose the general, right?

19 MR. RAILE: The evidence supports that.

20 JUDGE KETHLEDGE: That's what you're saying?

21 MR. RAILE: You also have to be concerned with the  
22 primary. They were --

23 JUDGE KETHLEDGE: If we're talking about the City of  
24 Detroit and let's say Senate districts, okay, where there's  
25 zero majority black districts right now, can we agree on this,

1 the Commission would have nothing to worry about with respect  
2 to the success of black preferred candidates in the general  
3 election in Senate districts in the City of Detroit that had a  
4 majority -- if they granted a couple majority black voter  
5 districts?

6 MR. RAILE: They might if they're packed. In other  
7 words, you could be concentrating the black vote into a few  
8 districts and diluting their vote in neighboring districts so  
9 that a plaintiff could come in and show more opportunity  
10 districts than you created.

11 JUDGE KETHLEDGE: Okay.

12 MR. RAILE: There's that possibility there.

13 JUDGE KETHLEDGE: I understand that argument.

14 MR. RAILE: You can go in both directions. I'm  
15 talking about the narrow tailoring. The Commission has to be  
16 worried not just about their suit but everyone's suit, so  
17 they've got to be concerned about going too high and too low  
18 based on the available data. They did look at primaries.  
19 They examined all of the primaries that there were, but the  
20 primaries just didn't provide the same level of direction as  
21 to really guide it. To be clear, Doctor Handley did at pages,  
22 I believe it's 48 and 49 -- I've already read it into the  
23 record -- do the analysis with primaries and did the best she  
24 could and demonstrated that as to the primaries the answer was  
25 not different. A 35 percent black voting age population

1 district in Detroit performs in the primaries. That was borne  
2 out in this past election. Mr. Bursch says the --

3 JUDGE KETHLEDGE: Not in some districts, though. I  
4 mean, Senate District 8 it didn't work out that way. It's  
5 40 percent BVAP, and I know you have, you know, reasons why --  
6 I mean, -- but at least as, you know, for judgment -- well,  
7 you're not asking for SJ, but I'm just expressing a general  
8 skepticism that it has worked out in the manner you're  
9 describing.

10 MR. RAILE: In three races. That's it. There's only  
11 three districts that didn't perform. All of the others did.  
12 And the plaintiffs' own demonstrative shows that. Mr. Bursch  
13 says that only a black black preferred candidate counts.  
14 That's wrong. Footnote one of the Clark versus Cincinnati  
15 rejected that argument. The Court said that a white candidate  
16 or candidate of another race can be the black preferred  
17 candidate. They look at races where -- -

18 JUDGE KETHLEDGE: That is true, but doesn't he have a  
19 point, at least intuitively, that a white candidate who is  
20 also the black preferred candidate might get more white votes  
21 than a black candidate who's the black preferred candidate  
22 would get from those same voters?

23 MR. RAILE: That's true. But if the black voters  
24 prefer that candidate, that's the black voters' choice.

25 JUDGE KETHLEDGE: I get it. I get it.



1 MR. RAILE: So it's not legally relevant. What the  
2 plaintiffs are saying is --

3 JUDGE KETHLEDGE: Well, it's probative that people  
4 vote along racial lines to some extent.

5 MR. RAILE: It's probative that they don't.

6 JUDGE KETHLEDGE: That whites do. It doesn't  
7 refute -- it really doesn't tell us anything about whether  
8 whites will vote for a black candidate.

9 MR. RAILE: But it does tell us that --

10 JUDGE KETHLEDGE: I think that's kind of the --

11 MR. RAILE: -- they will vote for the same candidate  
12 and there are districts where that occurs and this is why --

13 JUDGE KETHLEDGE: Hopefully, sure.

14 MR. RAILE: No. There are. I mean, I have a list  
15 of -- I lost my list, but I have a list of districts where  
16 black preferred candidates won, but keep in mind, Mr. Bursch  
17 cited case law where there's two white candidates and courts  
18 have said when there's two white candidates the black vote for  
19 one of the white candidates isn't that probative. That's not  
20 what we're talking about here. We're talking about races  
21 where there's a black candidate in the race and the black vote  
22 isn't going for that candidate. They have a racial choice.  
23 They have the opportunity to vote along racial lines. There's  
24 the possibility of polarization, and they're not voting in a  
25 polarized way.

1 JUDGE KETHLEDGE: My question -- I'm not trying to  
2 give you a hard time. Which one are --

3 MR. RAILE: Senate District 7, one district that --

4 JUDGE KETHLEDGE: Okay. Senate 7?

5 MR. RAILE: Senate District 3, 76 percent of the  
6 black vote went to Asian candidate Stephanie Chang --

7 JUDGE KETHLEDGE: Okay.

8 MR. RAILE: -- not the black candidate, Toinu Reeves.  
9 In Senate District 6 Mary Cavanagh was 48 percent of the black  
10 vote. She's Hispanic. She beats Darryl Brown. He's a black  
11 candidate. The black vote chose the Hispanic. The plaintiffs  
12 are saying the Court should disagree with those votes even  
13 though the voters, the black voters had a different preferred  
14 candidate. That's not what the Voting Rights Act does. It  
15 would be different if we were putting up white on white races,  
16 but we're not. We're looking at African American races.

17 Mr. Bursch also said -- he pointed to page eight of  
18 his reply brief -- I know I'm about to run out of time. He  
19 says that page eight has all this evidence of polarized voting  
20 in the past. It's not true. Most of the cases he's citing --  
21 and Doctor Handley has this at joint appendix nine, these are  
22 all the races. In 2014 there's not a single Democratic  
23 primary, not one, where both Gingles two and three are met.  
24 Zero. In 2016, not a single Democratic primary where both  
25 Gingles two and three are met. 2020, not a single Democratic

1 primary where Gingles two and three are met.

2 JUDGE KETHLEDGE: What page is that?

3 MR. RAILE: This is joint appendix page nine. Mr.  
4 Bursch says that in the 26 open house primaries black  
5 candidates loss four of six races. That's not true. Joint  
6 appendix 348, the cite he gives refutes that, so does joint  
7 appendix nine. These statements are not true. In all of  
8 these races --

9 JUDGE MALONEY: One minute, Mr. Raile.

10 MR. RAILE: -- there are 40. There's only two  
11 elections over the course of four years where Gingles two and  
12 three are both met. That's the Democratic primaries. That's  
13 not a compelling voting rights claim. It's certainly not one  
14 that would be amendable to judgment as a matter of law.

15 JUDGE KETHLEDGE: If we reject your argument of Perez  
16 as to Gingles one and say you just have to put that plaintiff  
17 in a district that has a majority of black voters, does  
18 that -- at that point -- if we did that, would you concede  
19 that they've met Gingles one as to some of these districts?

20 MR. RAILE: No. None.

21 JUDGE KETHLEDGE: Really, none?

22 MR. RAILE: Because we --

23 JUDGE MALONEY: Isn't Abbott distinguishable?

24 MR. RAILE: I'm not relying on Abbott per Judge  
25 Kethledge's hypothetical because the reasonably configured

1 requirement requires an assessment of whether the districts  
2 follow the redistricting criteria that govern the  
3 redistricting authority. We've created a material fact  
4 dispute on that in the E declaration.

5 JUDGE KETHLEDGE: You think they could do that with  
6 Senate districts in Detroit? You don't think that you could  
7 have a reasonably configured district in Detroit that has a  
8 majority of black voters in a city with 77 percent black  
9 voting population generally?

10 MR. RAILE: They haven't proven you can do five, and  
11 we're entitled to try that question --

12 JUDGE KETHLEDGE: Okay.

13 MR. RAILE: -- to find Gingles --

14 JUDGE KETHLEDGE: If there's a trial it's going to be  
15 a long trial if we're having to try stuff like that.

16 MR. RAILE: These cases can be long. Hill went to  
17 trial twice each time for a week. This is the standard fare  
18 in these cases. Plaintiffs have not cited anything remotely  
19 supporting judgment as a matter of law in this. LULAC, the  
20 case that they cite, that was a trial case. Every single  
21 Supreme Court case that they've addressed -- Abbott v Perez,  
22 that was a trial case. These cases get tried. That's how the  
23 voting act cases work. It's highly fact intensive. The  
24 reasonably configured standard is so. We've created a  
25 material fact dispute.

1 JUDGE MALONEY: Because I'm such a nice guy I'm going  
2 to give each side four minutes in addition to the time you've  
3 already expired. Go ahead, Mr. Bursch.

4 MR. BURSCH: Is that five total? My friend, Mr.  
5 Raile, proves our point, you know, when he says the black  
6 preferred candidates win, the black candidate of choice  
7 sometimes when they're not black. He points to Senate  
8 District 3, 6 and 7. In each one of those the incumbent --  
9 I'm sorry, the person who won was a incumbent, and as we  
10 explained at length in our brief, each one of those in the  
11 previous election where they became the incumbent was not the  
12 black candidate of choice, so he can't look at those districts  
13 and say that somehow that shifts all the other data that we  
14 have with respect to polarized voting.

15 And he's just wrong when he's talking about these  
16 bullet points on page eight of our reply brief. These are all  
17 from the Trende report. He's not saying that the black  
18 candidates of choice didn't win. He's saying the voting was  
19 polarized and the data supports that. I don't think there's  
20 really any big controversy about that. Otherwise, they  
21 wouldn't be asserting that they have to take race into  
22 consideration because the VRA wouldn't be here.

23 Two other points he says right at the end there. He  
24 says on Gingles one, Judge Kethledge -- I think you might have  
25 cut him off, he said the Eid declaration, Mr. E-i-d, somehow

1 he creates a question of fact because he points to all of  
2 these communities of interest that weren't honored in the  
3 demonstration map that Mr. Trende did. Well, as we point out  
4 at length in our reply brief, all this stuff he says about  
5 communities of interest doesn't appear anywhere in the  
6 Commission record. It's post hac reasoning that makes it  
7 irrelevant to whether Gingles was satisfied.

8 In addition -- this kind of goes to Judge Neff's  
9 point earlier about perfect being the enemy of the good -- the  
10 Gingles one analysis isn't a beauty contest. It's simply can  
11 this be done, and it clearly can.

12 He also points to a couple of handful of cases, says  
13 these are always resolved on trial. Well, that's not true.  
14 It is true that there aren't many summary judgment cases, and  
15 that's because many, many of these cases are resolved on  
16 preliminary injunction where the Court is simply asking is  
17 there a likelihood of success on the merits. We would point  
18 to more summary judgment cases except in the ones that are  
19 clear, like ours, they get resolved on preliminary injunction.  
20 The map gets redrawn before the election and that's the end of  
21 it. There is no more case law.

22 I think it would be difficult for you or your clerks  
23 or anyone else to go find another case that shows how black  
24 voters have been more harmed in one election cycle as a result  
25 of the redrawing of a map using 40 percent racial quotas than

1       this one, and we have past evidence of this so it's not just a  
2       cycle, but --

3               JUDGE KETHLEDGE: What about Mr. Raile's point that  
4       you talk about 40 percent caps. The districts have numbers  
5       higher than 40 percent, some of these, many of them.

6               MR. BURSCH: Sure. Only because the percentage of  
7       black voters in this area is so high that inevitably you're  
8       going to have some, but we know from the mouths of the  
9       commissioners that during this process there was a cram down.  
10      There were commissioners who were trying to draw maps that  
11      would have looked like the maps we had since the 1960s with  
12      adequate majority-minority districts and the attorney forced  
13      them to have lower numbers.

14              JUDGE KETHLEDGE: You say commissioners plural. Is  
15      there anyone besides the chairperson?

16              MR. BURSCH: I don't know that anybody disagrees with  
17      that. I would rely on the MSU report which they took a close  
18      look at all these proceedings and reached the exact same  
19      conclusion. There's really not a debate about that other than  
20      to say, oh, a couple districts were over 40 percent.

21              The last point I want to make --

22              JUDGE MALONEY: One minute, Mr. Bursch.

23              MR. BURSCH: Yes. We have plenty of historical data  
24      to back up the 2022 election results. The Commission's  
25      contention is the black voters, the plaintiffs who are in this

1 courtroom have to wait until their candidates lose again in  
2 2024 and again in 2026 and maybe 2028 before we have  
3 sufficient data to give them a remedy under the Voting Rights  
4 Act and the Equal Protection Clause. That is not what the law  
5 says. When the evidence of white polarized voting is as  
6 overwhelming as it is here, particularly in the five districts  
7 that I've identified, the appropriate thing is to give them a  
8 remedy now, and if you grant summary judgment on those five  
9 districts, the map is going to have to be we redrawn. That's  
10 certainly what should happen here.

11 JUDGE MALONEY: Thank you, sir. Four minutes, Mr.  
12 Raile.

13 MR. RAILE: Thank you, Your Honor. Just a few  
14 rebuttal points. First of all, the plaintiffs are just  
15 legally wrong about incumbency. Clark versus Cincinnati also  
16 addressed that issue and said that incumbency is not to be  
17 regarded as a special circumstance that this counsel raised  
18 unless a -- something unique about the incumbency is shown by  
19 the plaintiff.

20 JUDGE KETHLEDGE: I'm not trying to be flippant but  
21 we're not bound by Sixth Circuit precedence in this case,  
22 right?

23 MR. RAILE: So I can give you what I consider to be a  
24 technically sound answer to that.

25 JUDGE KETHLEDGE: That would be a good answer.



1 MR. RAILE: My technically sound answer is this is  
2 the U.S. District Court for the Western District of Michigan  
3 case and it's in the Sixth Circuit. Now you're going to  
4 respond and say the Sixth Circuit can't reverse us and the  
5 Supreme Court is not bound by that so how could you ever  
6 enforce that, and I'll say touche', Judge Kethledge.

7 JUDGE KETHLEDGE: So we are where we thought we were.

8 JUDGE MALONEY: We have two district judges on the  
9 bench here and the Sixth Circuit can't reverse us?

10 JUDGE KETHLEDGE: It would be fun for all of us.

11 JUDGE MALONEY: Go ahead, Mr. Raile. Go ahead.

12 MR. RAILE: What I would say is that what it said on  
13 this point is highly persuasive because incumbency is very  
14 common. And what the Court has said about that it said in  
15 Cooper v Harris. Recall, Cooper versus Harris fails every  
16 single one of their tests. It was one district, Congressional  
17 District 1. The Court looked at general elections. They say  
18 you shouldn't do that. The Court looked to an incumbent,  
19 Butterfield, a long-term incumbent, a highly powerful member  
20 of Congress who had been there since 2004. The gist of the  
21 Court's opinion in Cooper versus Harris is Butterfield can win  
22 the district, ratcheting up to 50 percent is not narrowly  
23 tailored. The crossover district we performed, it satisfied  
24 the Voting Rights Act. Incumbency is being overplayed  
25 substantially by the plaintiffs in this case.

1 JUDGE KETHLEDGE: If I can ask you a quick question,  
2 and I don't mean to steal your time but, you know, we were all  
3 here for the last case and those were federal lines and  
4 community of interest just had total primacy in drawing those  
5 lines, was my recollection, and we're spending a lot of time  
6 on this case, and just to be candid with you, Mr. Raile, I  
7 look at this and some of these districts and I wonder, you  
8 know, what happened to community of interest as opposed to  
9 just trying to do this partisan balancing?

10 MR. RAILE: Well, we have evidence at this stage from  
11 the E declaration district by district of what the communities  
12 of interests were, that's point one. Two, there is an  
13 important partisan angle here as well. The Commission cannot  
14 hack the Detroit area districts, concentrate the Democratic  
15 vote in Detroit --

16 JUDGE KETHLEDGE: Sure.

17 MR. RAILE: -- and it has to cross county lines. The  
18 E declaration says that. It looks at the Trende plan and says  
19 it doesn't cross county lines, I don't see how this could be  
20 fair from a partisan point of view. Those are important  
21 considerations. We have declarations of Commissioner Eid  
22 saying these were as important in my mind as the Voting Rights  
23 Act. We don't deny that race was considered. Whether it was  
24 predominant is a fact question, and the plaintiffs don't have  
25 even a single assertion about a single challenged district to

1 satisfy their burden on that. At a minimum, the case is  
2 triable. I have no -- nothing further to say unless the Court  
3 has further questions.

4 JUDGE NEFF: I have a question, Mr. Raile. If this  
5 case does go to trial, what would a trial look like?

6 MR. RAILE: Can you be more specific in what you're  
7 referring to?

8 JUDGE NEFF: Yeah. I mean, what are we -- what can  
9 we expect by way of evidence and testimony on either side?

10 MR. RAILE: So what I would say from the defense side  
11 is we have three expert witnesses.

12 JUDGE NEFF: So is this a battle of the experts? Is  
13 that what it's going to come down to?

14 MR. RAILE: I think that is probably the lion's share  
15 of the case. Usually that's how it works. We do have lay  
16 witnesses, and we certainly would look at calling  
17 commissioners to testify about questions regarding intent.  
18 I'm not in a position to tell you who that is today because  
19 we --

20 JUDGE NEFF: I don't need names. I'm just curious.

21 MR. RAILE: We can look at the summary judgment  
22 record. I'm sure the plaintiffs will call Professor Trende as  
23 their expert witness. They have a second expert, Doctor  
24 Lockerbie, who would testify for them. I believe they would  
25 sponsor two lay witnesses, Lemmons and Smith, and we have some

1 quarrels with that but that would be dealt with at trial. I  
2 don't know who else they would call.

3 There might be an issue of standing. We're not sure  
4 where House District 13 is going to end up. I shouldn't say  
5 that, Mr. Bursch has actually told us where it will end up, it  
6 will come out of the case so I'm not sure if there would be a  
7 standing issue that would require plaintiffs to testify.  
8 Sometimes you see lay witnesses. We would have three expert  
9 witnesses talking about all these issues, and we would get  
10 into the issues that the Court has asked about today, why is  
11 this election probative, why is it not probative, what does  
12 this tell us, what does this not tell us.

13 JUDGE MALONEY: District by district, right?

14 MR. RAILE: And it would go district by district,  
15 yes. Does that answer your question?

16 JUDGE NEFF: It does. Chillingly.

17 JUDGE MALONEY: We'll consider the motions  
18 submitted --

19 MR. BURSCH: From our perspective, I think most of  
20 that is very accurate, but we would put all of our plaintiffs  
21 on the stand, and they will tell you from decades of history  
22 from living in Detroit that black voters vote cohesively,  
23 white voters vote cohesively, white candidates don't come to  
24 Detroit, and when black candidates go to Oakland County, the  
25 police gets called. That would be our testimony.

1 JUDGE MALONEY: Thank you. We'll get an order out as  
2 soon as we can. Thank you.

3 THE CLERK: All rise, please. Court is adjourned.

4 *(Whereupon, hearing concluded at 3:29 p.m.)*

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*REPORTER'S CERTIFICATE*

I, Genevieve A. Hamlin, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Genevieve A. Hamlin

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